Office-Supreme Court, U.S.
FILED
JUL 16 1985
ALEXANDER L. STEVAS,
CLERK

85-81

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CHRISTMANN & WELBORN,
Petitioner,

v.

U.S. DEPARTMENT OF ENERGY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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QUESTIONS PRESENTED FOR REVIEW *

1. Whether, having designated a high ranking federal official as its authoritative spokesman to advise members of the oil and gas industry of their rights and obligations under new administrative regulations, and having thereby misled a small and independent crude oil producer to adopt one course of compliance, a government agency may later change its mind and impose liability in excess of six million dollars on that party for the benefit of another party, where (a) all the traditional elements of estoppel are present and the private party justifiably relied on that advice to its detriment, (b) the party sought to be held liable obtained the most authoritative government advice available at the time, and (c) the monies at issue involve no public funds and do not affect in any way the public fisc.

2. Whether, in the absence of congressional authorization and where the only justification offered by the agency is "administrative convenience," a federal administrative agency has the authority to undermine rights and liabilities among private parties established by state law.

LIST OF PARTIES BELOW

Christmann & Welborn, a joint venture between John J. Christmann and J.M. Welborn, was petitioner below. Respondents below were the U.S. Department of Energy; John S. Herrington, Secretary of Energy; Economic Regulatory Administration; and Rayburn Hanzlik, Administrator, Economic Regulatory Administration.

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* On July 1, 1985, the Temporary Emergency Court of Appeals rendered its decision in *United States, et al.* v. *Exxon Corporation, et al.*, Nos. DC91-100 (Consolidated), slip op., affirming a district court judgment that Exxon Corporation overcharged purchasers in excess of $1.5 billion. Counsel for petitioner understands that Exxon Corporation intends to submit a petition for rehearing and believes that it will then seek review by this Court of the court of appeals' decision in that case. Because the instant petition and a petition by Exxon Corporation will involve an identical issue of importance to both cases, petitioners request that, if the Court does not immediately determine to grant the instant petition, the Court defer resolution of the instant petition until such time as the Court may consider both petitions concurrently.

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PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

Petitioner prays that this Court issue a writ of certiorari to review the decision of the Temporary Emergency Court of Appeals of the United States in *Christmann & Welborn* v. *Department of Energy, et al.*, ____ F.2d ____, Nos. 5-109 and 5-110, slip op. (Temp. Emer. Ct. App. March 29, 1985).

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Texas is reported at 589 F. Supp. 576, and is reprinted in the Appendix to this Petition at App. 9a-21a. Orders issued by the district court on December 20, 1982 (App. 26a-28a), January 24, 1983 (App. 25a), and March 17, 1983

(App. 22a-24a), were not reported but are reprinted in the Appendix. The opinion of the Temporary Emergency Court of Appeals of the United States has not been reported as of the date of the instant petition; it is reprinted in the Appendix at App. 1a-8a. The Decision and Order of the agency is reprinted at App. 29a-41a.

JURISDICTION

Petitioner seeks review of a judgment of the Temporary Emergency Court of Appeals of the United States entered on March 29, 1985. A timely petition for rehearing was denied on April 17, 1985. App. 43a. On May 6, 1985, the Chief Justice signed an order extending the time for filing a petition for a writ of certiorari to and including July 16, 1985. App. 42a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) and section 211(g) of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note.

STATUTES INVOLVED

Section 209 of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note, provides:

> Whenever it appears to any person authorized by the President to exercise authority under this title that any individual or organization has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of any order or regulation under this title, such person may request the Attorney General to bring an action in the appropriate district court of the United States to enjoin such acts or practices, and upon a proper showing a temporary restraining order or a preliminary or permanent injunction shall be granted without bond. Any such court may also issue mandatory injunctions commanding any person to comply with any such order or regulation. In addition to such injunctive relief, the court may also order restitution of moneys received in violation of any such order or regulation.

STATEMENT OF THE CASE

Although this case grows out of the labyrinth of regulations that for almost eight years governed the domestic purchase and sale of petroleum products, no detailed understanding of those regulations is necessary in order to resolve the issues raised. The only issues are whether an administrative agency should be permitted, first, whimsically to impose on one regulated party liability to another private party for conduct that was sanctioned and induced by the government; and, second, to impose on that party liability for a series of transactions by others, even though there is no statutory or rule authority therefor and the only justification is the agency's perception of what would comport with administrative convenience.

The underlying issues at stake in this case have important public policy implications, and address the fundamental fairness with which our government treats its private citizens whose business transactions are subject to extensive regulation. As this Court emphasized in its recent decision in *Heckler* v. *Community Health Services,* ____ U.S. ____, 104 S. Ct. 2218 (1984), "when the Government acts in misleading ways, it may not enforce the law if to do so would harm a private party as a result of governmental deception." 104 S. Ct. at 2224 n.12. *Precisely that principle is at stake in this case.*

Here, at the inception of a program designed to govern prices charged in private transactions, a high ranking official was designated as an authoritative spokesman to provide specific guidance on certain issues. The agency intended at the time that private parties rely on such advice, and petitioner did so. Two years later, the agency had a change of heart concerning the meaning of its prior regulations. Although petitioner was misled, the agency now disavows responsibility for the representations, asserts those transactions were illegal, and seeks to impose a staggering liability of six million dollars upon petitioner for having relied on such advice. Should such governmental arrogance, which can jeopardize the very integrity of the governmental process, obtain judicial sanction?

The factual background of this case is as follows. In 1972, certain working interest owners of eight oil and gas leases located in Yoakum and Terry Counties, Texas, were producing and individually selling their crude oil to Shell Oil Company (Shell). Because the leases had been in production for quite some time and were encountering decreases in production, two of the working interest owners, John J. Christmann and J.M. Welborn, suggested to the other working interest owners that it might be to the common economic interest of all of them to unitize their properties[1] and to implement secondary recovery techniques.[2] Following approval by the appropriate state regulatory agency, the Texas Railroad Commission, the unitization, known as the CWC Prentice Unit, became effective September 1, 1973. App. at 1a. Christmann and Welborn (C&W), a newly formed joint venture entity, was designated the operator of the Unit, with defined rights and obligations under the Unit Operating Agreement and applicable state law.

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[1] Unitization is "[a] term properly used to denominate the joint operation of all or some portion of a producing reservoir . . . ." 8 Williams & Meyers, Oil and Gas Law 938. "The best results in conservation can be attained only by unitization. Only in this way can appropriate use of reservoir pressures be made and secondary recovery operations utilized . . . ." *Id. See also Pennzoil Co.* v. *DOE,* 680 F.2d 156, 158 n.3 (Temp. Emer. Ct. App. 1982), *cert. dismissed,* 459 U.S. 1190 (1983).

[2] Secondary recovery is defined as "a method of recovery of hydrocarbons in which part of the energy employed to move the hydrocarbons through the reservoir is applied from extraneous sources by the injection of liquids or gases into the reservoir." 8 Williams & Meyers, Oil and Gas Law at 798. Typically, after leases are unitized, some formerly extractive wells are converted into injection wells, and all the parties to the unitization agreement exchange their interests in individual leases for interests in the production from all the leases encompassed by the unitization agreement.

In the instant case, the unitization agreement discussed *infra* did not alter the terms of the contracts between the selling working interest owners and the purchaser, Shell; each of the working interest owners continued to sell his share of the production to Shell and to be paid for the production sold. It was undisputed below that under the Unit Operating Agreement, the working interest owners did not have joint and several liability in their transactions with Shell.

Meanwhile, on August 17, 1973, the Cost of Living Council (CLC), acting under authority granted to the President by the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note, promulgated regulations governing the prices to be charged in "first sales" of crude oil. 38 Fed. Reg. 22,536 (Aug. 22, 1973). These regulations established a two-tier price structure for crude oil, under which so-called "new oil" would be priced higher than "old oil."

Days after the regulations were published and aware that the Unit was to become effective approximately one week later, Mr. John J. Christmann, on behalf of C&W, attended a seminar sponsored by the government in Dallas, Texas, on August 24, 1973. Mr. Christmann knew at the time of the seminar that the Unit owners could continue to sell their crude oil to Shell, or they could retain ownership of their oil and have it refined by a refiner other than Shell pursuant to a processing agreement, in which latter case the Unit owners could sell the refined products in the open market. What Mr. Christmann did not know, and sought to ascertain at the seminar sponsored by the federal government, was how such transactions would be treated under the just-published regulations.

This seminar was held under the auspices of the federal agencies responsible for the new regulations, and was specifically designed to provide guidance to producers. At the seminar, Mr. Christmann discussed these transactions with Mr. Duke Ligon, who at the time held several key posts within the government, including Director of the Department of the Interior Office of Oil and Gas, Oil and Gas Advisor to the Secretary of the Treasury, and Executive Secretary and Chairman of the Working Committee of the Oil Policy Committee. He was well-versed in the new regulatory program, was responsible for setting policy for CLC oil and gas price regulation, and was designated by the government as its authoritative spokesman on these matters.

Mr. Ligon advised Mr. Christmann that under the regulations just issued it was not necessary for the Unit owners to enter into a processing agreement in order to obtain "new oil" prices for the Unit's production. Mr. Ligon explained "that for price control purposes the new Unit would be a separate and distinct 'property' with a Base Period Control Level of zero, thereby permitting the entire production to be sold at 'new oil' prices." [3] Mr. Ligon reaffirmed that advice in a subsequent telephone conversation with Mr. Christmann. Mr. Ligon's interpretation "constituted the most authoritative advice available at that time";[4] and there is no evidence that, if Mr. Christmann had been able to obtain a written interpretation at the time, it would have differed in any respect from that furnished by Mr. Ligon.[5]

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[3] App. at 2a. *See also* App. at 22a. It may seem incongruous in retrospect that leases which actually had production in 1972 would, if and once unitized, be treated for regulatory purposes as not having had production in that year. But a "property" was defined as "the right to produce," and the Department of Energy (DOE) has always agreed that the Unit had no right to produce prior to September 1, 1973.

Moreover, at the time, "new oil" sold for a mere 50 cents a barrel more than "old oil"; and if only the Unit's excess production over 1972 had been treated as "new oil," there would not have been an incentive to unitize, implement costly secondary recovery procedures, and thereby increase production of domestic crude oil. Instead, production would have continued to decrease and leases that could be made economical only by secondary recovery procedures implemented through unitization would have been abandoned. At the time, the government was very concerned about mounting oil imports and wanted to create incentives to increase domestic production.

[4] *See* App. at 2a. *See also* App. at 5a, n.8

[5] The government years later now asserts that C&W should be punished for having obtained and acted upon this advice, and that instead C&W should have filed a request for a written interpretation from the CLC. Yet, the record establishes that, at the relevant time, CLC recognized that persons in petitioner's position necessarily would rely on Mr. Ligon's advice and there was no mechanism in place to secure written interpretations. App. at 5a, n.8.

Based on the specific advice that he received from Mr. Ligon, Mr. Christmann notified Shell that he and the other Unit owners would continue to sell their crude oil to Shell and would expect to be paid the "new oil" price. The Unit owners forewent the opportunity to enter into processing agreements for their crude oil.[6] Shell thereafter paid "new oil" prices for the Unit owners' production.[7]

Until late 1975, insofar as petitioner was aware, the interpretation articulated by Mr. Ligon remained the only authoritative position of the agency. It was in late 1975 that petitioner first learned that on September 4, 1975, the Federal Energy Administration (FEA), which had succeeded to the Federal Energy Office (FEO), which in turn had succeeded to the CLC, issued a new interpretation, Ruling 1975-15, 40 Fed. Reg. 40,832 (Sept. 4, 1975), that adopted a different view of the pricing regulations than had been stated by Mr. Ligon over two years earlier.

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[6] Had the Unit owners entered into processing agreements for their crude oil, they would have received the equivalent of "new oil" prices for their production.

[7] Given Shell's economic self-interest in paying as low a price as possible for the crude oil it was purchasing, it is hardly surprising that Shell initially took the position that old oil prices should be paid. It later relented.

The FEA instituted an audit into the prices charged for crude oil produced from the Unit. During the audit and subsequent administrative proceedings, petitioner, the sole respondent in the agency's proceedings, made numerous efforts to have the agency include in the proceedings the working interest owners for whose account the oil in question had been sold and who had received the proceeds thereof. These working interests owners also tried to intervene in these administrative proceedings on their own behalf but were affirmatively excluded from participation.[8]

In December 1978, the Office of Hearings and Appeals of DOE issued a final Decision and Order. C&W was commanded by the Decision and Order retroactively to make refunds to Shell of the *entire* difference between the prices the agency said should have been charged by all the working interest owners and those actually charged by them; C&W did not itself receive all such monies. The amounts at issue exceed six million dollars, and will work catastrophic financial damage on this small and independent producer.

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[8] As the district court noted:

> Some of the other working interest owners notified DOE on several occasions that C&W did not represent them and had no authority to enter into any agreements on their behalf (R. 108, 109). Others notified C&W through counsel that they had defenses separate and apart from those asserted by C&W in the DOE action (R. 110-12). More importantly, these parties were totally precluded by DOE from any participation in any of the administrative proceedings and on one occasion DOE refused to allow them to attend a hearing despite the fact they had gone to the time and expense to attend. Instead, they were relegated to waiting outside without any opportunity to participate.

App. at 18a.

Following the issuance of tne Decision and Order, proceedings were instituted by C&W in the United States District Court for the Northern District of Texas. C&W sought to invalidate the Decision and Order and alternatively prayed that it not be held liable for the proportionate share of any overcharges received by the working interest owners other than the members of the C&W joint venture. App. at 3a. On behalf of the DOE, the United States first counterclaimed for enforcement of the Decision and Order and later, in July 1981, moved for a remand to DOE to reconsider whether the refunds of overcharges should be paid to Shell or distributed otherwise.[9]

On June 22, 1984, following dissolution of a stay of proceedings that had been in force pending a decision from the Temporary Emergency Court of Appeals in another case,[10] the district court certified as a final judgment its Memorandum

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[9] App. at 3a. DOE's motion was prompted by Exec. Order No. 12,287, 46 Fed. Reg. 9909 (Jan. 30, 1981), decontrolling the prices charged in domestic sales of those petroleum products that were then still controlled. DOE has taken the position that once petroleum products were decontrolled, there was no longer any assurance that refunds to private parties such as Shell would be passed through to the marketplace and it therefore has sought to have the money paid to the government, for distribution by DOE to injured parties or to the Treasury, as determined by DOE.

[10] That case involved an industry-wide challenge to Ruling 1975-15, which was the basis for the DOE enforcement action against the petitioner. On April 22, 1982, the Temporary Emergency Court of Appeals upheld the validity of that ruling. The court did not address the applicability of its decision to producers who justifiably relied on specific statements by senior government officials to the contrary prior to the promulgation of Ruling 1975-15. *Pennzoil Co.* v. *DOE,* 680 F.2d 156 (Temp. Emer. Ct. App. 1982), *cert. dismissed,* 459 U.S. 1190 (1983).

Order and Final Judgment (App. at 9a-21a). The district court found that the government was entitled to enforcement of the Decision and Order, but only to the extent of 80% of the claimed overcharges.[11] The order of the district court was timely appealed to the Temporary Emergency Court of Appeals, which on March 29 of this year upheld the Decision and Order of DOE in every respect. The appellate court reversed the district court's finding on proportionate liability and ordered that C&W should refund 100% of the claimed overcharges, notwithstanding the fact that it had never received 20% of the sums now to be refunded. App. at 8a.

REASONS FOR GRANTING THE WRIT

I. THE INTEGRITY OF OUR GOVERNMENT PROCESS IS UNDERMINED WHEN A FEDERAL AGENCY CAN IMPOSE A STAGGERING LIABILITY FOR ACTION INDUCED BY AUTHORITATIVE STATEMENTS OF OFFICIAL SPOKESMEN AND ALL THE TRADITIONAL ELEMENTS OF ESTOPPEL ARE PRESENT

This petition poses an important and recurring question about justifiable reliance by private parties on advice given by government officials. Notwithstanding the significant number of federal cases in which governmental estoppel has been considered, and the widely divergent views held by the circuit courts of appeal, the Court has not articulated the circumstances under which the government will be equitably estopped from disclaiming, years later, authoritative interpretations issued by its agents and relied on by private parties in structuring their commercial undertakings. "The claim of the government to an immunity from estoppel is in fact a claim to exemption from the requirements of morals and justice. . . . [and it is]

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[11] This represented the proportion of the working interests in the Unit owned by Messrs. Christmann and Welborn, who were the only parties to the joint venture against which DOE had chosen to proceed in the administrative forum.

[c]onfidence in the fairness of the government [that] cements our social institutions" (Berger, *Estoppel Against the Government,* 21 U. Chi. L. Rev. 680, 707 (1959)). This confidence is obviously undermined where the government disavows statements of its *authorized* officials, and that disavowal can bankrupt private parties who justifiably relied thereon.

In recent years, the government has frequently instituted new and complex regulatory programs; some, like the one that ultimately led petitioner to this Court, generated an urgent need for guidance on the part of affected private businesses. Federal agencies charged with administering new regulations acknowledged the immediate need and dispatched federal officials to meet with industry representatives to provide specific guidance. These efforts are laudable. These officials knew the program's objectives and its substantive details, and that, to implement the program properly, their knowledge had to be imparted to regulated firms.

The government, however, cannot conduct itself on the premise, endorsed by the courts below, that it assumes no responsibility whatsoever for its actions when it knows that private parties will rely on such authoritative statements in conducting their businesses. The court of appeals' ruling says that even in private transactions undertaken on the basis of the most authoritative advice available from the government, freely volunteered, private entities must always face the risk that the government may have misled them, will change its mind, and may restructure the transaction years later, to effectuate a policy not even contemplated at the relevant time. The court of appeals has given the government further license to impose a *staggering financial liability upon a private party for following the very advice proffered by the government.* The law as viewed by the lower courts in this case is "[t]he joke is on you. You shouldn't have trusted us . . . ." *Brandt* v. *Hickel,* 427 F.2d 53, 57 (9th Cir. 1970). If this be the rule of law, it "is hardly worthy of our great government." *Id.*

Unlike prior decisions where this Court has been asked to estop the government, *all* the elements of estoppel have been met here. *E.g., Heckler* v. *Community Health Services,* ____ U.S. ____, 104 S. Ct. 2218, 2224 (1984).[12] The instant petition presents a case where "the public interest in ensuring that the Government can enforce the law free from estoppel [is] outweighed by the countervailing interest of citizens in some minimum standard of decency, honor and reliability in their dealings with their Government." *Id.*

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[12] *See* III J. Pomeroy, Equity Jurisprudence § 805 (S. Symons ed. 1941). First, the statement of an authoritative government official that all the crude oil produced from the CWC Prentice Unit would be treated as "new oil" was a material representation. Indeed, it was the central representation which set into motion the decision by the working interest owners to sell to Shell. Second, this material representation was later made inaccurate when, more than two years later, a successor agency issued Ruling 1975-15. Third, the working interest owners did not know nor could they have known that a successor agency would construe the regulations in the manner reflected in Ruling 1975-15, nor that it ultimately would be sustained some 10 years after the Unit owners had to choose their course. Fourth, it was made manifestly clear to the governmental representative, and he so understood, that binding arrangements would be made on the basis of his representations. Fifth, there was reliance in the decision to sell the Unit's production to Shell at the "new oil" price and to forsake another opportunity to participate in a processing agreement which would have permitted the Unit owners to receive the equivalent of new oil prices for all of their production.

A. The Decision Below Misconstrues the Prior Decisions of This Court and Would Allow the Government To Benefit by Misleading Its Citizens

The government does not contest the fact that there was no definitive written interpretation of the relevant regulatory issues in August 1973;[13] and that such an interpretation did not come for more than two years following the statements by Mr. Ligon in the form of Ruling 1975-15. 40 Fed. Reg. 40,832 (Sept. 4, 1975).[14] Nor can the government dispute that Mr. Ligon, the

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[13] Notwithstanding the need to implement the regulations immediately, the government conceded below that there was no mechanism by which to seek an official interpretation in August 1973. *See* App. at 14a. The absence of such mechanism left regulated firms in a severe dilemma.

[14] This ruling declared that a producer who created an enhanced recovery unit in 1973 or thereafter from leases producing oil in 1972 would have the right to charge new oil prices only as to that oil produced in excess of the aggregate production from such leases in 1972.

This new ruling spawned a massive challenge to the position finally taken by the FEA in Ruling 1975-15, spearheaded by one of the most substantial oil producers. *Pennzoil Co.* v. *DOE,* 680 F.2d 156 (Temp. Emer. Ct. App. 1982), *cert. dismissed,* 459 U.S. 1190 (1983).

In concurrence in *Pennzoil,* Judge Jameson noted that the definition of "property" in the regulations and the interpretations of that term were filled with *ambiguity, uncertainty* and *confusion.* 680 F.2d at 181. As evidenced by official interpretations, decisions of the FEA's Office of Exceptions and Appeals, FEA forms and manuals, informal telephone communications with FEA officials, papers presented to industrial conferences, affidavits of former agency personnel, and post-1975 regulatory changes, the DOE's interpretation of the definition of "property" was not apparent to a great many in the responsible agencies nor to oil producers. 680 F.2d at 180-81. The FEA admitted its own internal confusion and dissension over the definition of "property" and for this reason petitioner necessarily relied on the only authoritative position available to it:

> Mr. Hill: In this case [the definition of "property"], the public hearing and the comments, we think, clearly indicate that the initial interpretation was very broad. . . . It was not clear throughout that period exactly what the regulation meant; it was not even clear to the regulatory agency itself. . . . It has an awful lot to do with the quality of our instructions and guideline consistency as carried out in our compliance program.

(footnote continues)

government's designated representative, was as knowledgeable as anyone in the government about the regulations and was held out by the government as its authoritative spokesman.[15] He told Mr. Christmann that under the newly issued regulations all production from the new Unit would be considered new oil entitled to the higher price. App. at 22a. Based on this authoritative interpretation of the regulations, the Unit's working interest owners arranged for the sale of their oil production to Shell at the new oil price.

The court of appeals nevertheless held that even if C&W received the advice from an individual who was among the most knowledgeable persons in government concerning the regulations, and the advice was the best that could be obtained at the time from any governmental source, no estoppel would arise in the absence of "affirmative misconduct" by the government. Relying on *INS* v. *Hibi,* 414 U.S. 5 (1973); *Schweiker* v. *Hansen,* 450 U.S. 785 (1981); *INS* v. *Miranda,* 459 U.S. 14 (1982); and *Heckler* v. *Community Health Services,* ____ U.S. ____, 104 S. Ct. 2218 (1984), the court of appeals reasoned that even where *all* the elements of estoppel are present, there must nevertheless be a showing of "affirmative misconduct" by the government. App. at 6a.

(footnote continued)

> Mr. Curtis: . . . Isn't it a little disturbing that that definition was not clear and precise to even FEA as you indicate in August 1976, 3 years after the program has been in effect?
>
> Mr. Hill: Absolutely, Mr. Curtis . . . .

Crude Oil Pricing Compliance Problems: *Hearings on Actions Taken by the Federal Energy Administration to Implement the Pricing Requirements of the Energy Policy and Conservation Act before the Subcommittee on Energy and Power of the House Committee on Interstate and Foreign Commerce,* 94th Cong., 2d Sess. 103 (Nov. 11, 1976). (Statement of John A. Hill).

[15] Ligon had supervisory responsibility as Director of the Office of Oil and Gas over the Interior Department Hearings and Appeals Board, until that tribunal was transferred to the FEO. Ligon became the Assistant Administrator of the FEO upon its creation. When in 1974, the FEO was replaced by the FEA, Ligon was appointed Assistant Administrator for Policy Planning and Regulation, with responsibility for assisting in refining and reformulating the Mandatory Petroleum Price and Allocation Regulations.

This represents a misreading of the decisions relied upon. The Court's prior decisions have never dealt with the three *crucial* factors found in the instant petition and do not stand for the mechanical rule seemingly imposed by the lower court.

First, the advice here came from a *senior* government official and there was no viable administrative mechanism to secure any more authoritative interpretation of agency regulations.[16]

Second, recognizing the need for immediate guidance in ongoing business decisions, the government *affirmatively acted to dispatch knowledgeable and high-ranking officials to interpret and explain its new regulations to the industry.* The government's sponsorship of symposia, the very purpose of which was to furnish the guidance at issue, provided its officials with the apparent authority to bind the government to their considered opinions. Surely the government knew and intended that the impression would be created that those who conducted the symposia had authority to explain the regulations and that regulated parties would act on the explanations provided.[17]

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[16] This is not the situation where a low level government official makes casual or unauthorized statements upon which private parties later feign reliance. The citizenry's interest in "obedience to the rule of law," *Heckler* v. *Community Health Services,* ____ U.S. ____, 104 S. Ct. at 2224, can hardly be undermined when the government has not provided formal means to ascertain the meaning of rules and those rules are admittedly susceptible to different interpretations.

[17] "Apparent authority results from a manifestation by a person that another is his agent, the manifestation being made to a third person and not, as when authority is created, to the agent." Restatement (Second) of Agency § 8 comment a (1958).

Unless the government intended the entire exercise to amount to no more than an act of futility, it should be bound by the apparent authority with which it invested its agents.[18]

There is a third factor that differentiates this case from those in which concern has been expressed about permitting estoppel against the government. Unlike *Federal Crop Insurance Corp.* v. *Merrill,* 332 U.S. 380 (1947), or *Schweiker* v. *Hansen,* 450 U.S. 785 (1981), no drain on the public fisc is implicated at all in this case. Neither is a valuable status sought, as in the citizenship or permanent residency cases. *E.g., INS* v. *Miranda,* 459 U.S. 14 (1982); *INS* v. *Hibi,* 414 U.S. 5 (1973). The interpretation was sought by petitioner to allow private parties to structure their affairs with another private party, and the government's change of heart only affected those private relationships. Judicial reluctance to grant rights bestowed by Congress without compliance with statutory conditions is not at issue here.

No new or sweeping principle would flow from a determination that the government can be estopped by the actions of a government official made within the scope of authority. *Broad Avenue Laundry and Tailoring* v. *United States,* 681 F.2d 746, 747-48 (Ct. Cl. 1982); *Molton, Allen and Williams, Inc.* v. *Harris,* 613 F.2d 1176, 1179 (D.C. Cir. 1980); *Miller* v. *United States,* 500 F.2d 1007, 1010 (2d Cir. 1974); *Ritter* v. *United*

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[18] The existence of apparent authority in the instant petition differentiates this case from *Heckler* v. *Community Health Services,* ____ U.S. ____, 104 S. Ct. 2218 (1984), where the Court pointed out that respondent's insurer held the role of fiscal intermediary; it did not have actual or apparent authority to resolve policy questions. *Id.* at 2226 and n.21. Moreover, the CLC and the FEA could have implemented the same sort of active disclaimer practices as those practiced by the Internal Revenue Service to make the public aware that only binding written opinions can be safely relied upon. *See* 3 Internal Revenue Manual (CCH) Ch. 422(3), at 14534, 14546, and 14551 (Oct. 21, 1981). It did not do so in this case, but instead permitted petitioner to undertake business transactions in the belief that such advice could be safely relied upon.

States, 28 F.2d 265, 267 (3d Cir. 1928). There would be no inconsistency with the oft-quoted statement that "anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority." *Federal Crop Insurance Corp.* v. *Merrill,* 332 U.S. at 384. Indeed, because the government clothed its agents with apparent authority, their actions were within the bounds of their authority, which could not be annulled by the issuance of a contrary ruling more than two years later. *See Broad Avenue Laundry and Tailoring* v. *United States,* 681 F.2d at 747. If the government can never be estopped except when it is "right," then it can never be estopped at all.

This Court has prevented the government from benefiting by misleading its citizens, and petitioner seeks application of the same principles here. *United States* v. *Pennsylvania Industrial Chemical Corp.,* 411 U.S. 655, 670-75 (1973) (criminal defendant may assert as a defense that the government led him to believe that his conduct was legal); *Moser* v. *United States,* 341 U.S. 41, 47 (1951) (applicant cannot be deemed to waive right to citizenship on the basis of a form he signed when he was misled as to the form's effect on his rights). As the Court noted in *Community Health Services,* these cases stand for "the premise that when the Government acts in misleading ways, it may not enforce the law if to do so would harm a private party as a result of governmental deception." *Heckler* v. *Community Health Services,* 104 S. Ct. at 2224 n.12. It ill suits "the public's interest for the government to deal dishonestly or in an unconscientious manner" with petitioner. *United States* v. *Georgia-Pacific Co.,* 421 F.2d 92, 100 (9th Cir. 1970).

B. The Case Presents a Unique Opportunity To Resolve Different Standards Articulated by the Circuits and To Resolve the Conflict Between the Decision Below and Those of Other Circuits

Because of the diverse broad standards for granting governmental estoppel articulated by the circuit courts of appeal,[19] the Court is urged to clarify its past rulings on this subject and set forth standards by which governmental estoppel may be judged. In *Community Health Services,* this Court indicated that estoppel may be properly invoked when "the public interest in ensuring that the Government can enforce the law free from estoppel [is] outweighed by the countervailing interest of citizens in some minimum standard of decency, honor and reliability in their dealings with the Government." 104 S. Ct. at 2224 (footnote omitted). The threshold of "affirmative misconduct," which the court of appeals now articulates as fundamental, was not even a factor in the Court's decision. Further elucidation of the *Community Health Services* holding is called for in light of the vitally important principles at stake.

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[19] *E.g., Best* v. *Stetson,* 691 F.2d 42 (1st Cir. 1982); *Portmann* v. *United States,* 674 F.2d 1155 (7th Cir. 1982); *Broad Ave. Laundry and Tailoring* v. *United States,* 681 F.2d 746 (Ct. Cl. 1982); *Molton, Allen and Williams, Inc.* v. *Harris,* 613 F.2d 1176 (D.C. Cir. 1980); *Corniel-Rodriguez* v. *INS,* 532 F.2d 301 (2d Cir. 1976); *United States* v. *Wharton,* 514 F.2d 406 (9th Cir. 1975); *Miller* v. *United States,* 500 F.2d 1007 (2d Cir. 1974); *Emeco Industries, Inc.* v. *United States,* 485 F.2d 652 (Ct. Cl. 1973); *United States v. Lazy FC Ranch,* 481 F.2d 985 (9th Cir. 1973); *Brandt* v. *Hickel,* 427 F.2d 53 (9th Cir. 1970); *United States* v. *Georgia-Pacific Co.,* 421 F.2d 92 (9th Cir. 1970); *United States* v. *Fox Lake State Bank,* 366 F.2d 962 (7th Cir. 1966); *Semaan* v. *Mumford,* 335 F.2d 704 (D.C. Cir. 1964); *Walsonavich* v. *United States,* 335 F.2d 96 (3d Cir. 1964); *Simmons* v. *United States,* 308 F.2d 938 (5th Cir. 1962); *Spears* v. *Fed. Crop Ins. Corp.,* 579 F. Supp. 1022, 1025 (E.D. Tenn. 1984) ("The Court finds no reason that traditional principles of estoppel should not apply to the federal government in the same manner they apply to private parties."); *Gestuvo* v. *INS,* 337 F. Supp. 1093 (C.D. Cal. 1971).

Both the Courts of Appeal for the Ninth Circuit and the District of Columbia Circuit have employed "balancing tests" to determine the appropriate parameters for application of estoppel against the government. If the government's conduct "threatens to work a serious injustice and if the public's interest would not be unduly damaged by the imposition of estoppel," it is a defense available against the government. *United States* v. *Lazy FC Ranch,* 481 F.2d 985, 989 (9th Cir. 1973). *See Morris* v. *Andrus,* 593 F.2d 851, 854 (9th Cir.), *cert. denied,* 444 U.S. 863 (1979); *United States* v. *Wharton,* 514 F.2d 406, 411 (9th Cir. 1975). "[A]dministrative regularity must sometimes yield to basic notions of fairness." *Brandt* v. *Hickel,* 427 F.2d 53, 57 (9th Cir. 1970). In *International Organization of Masters, Mates & Pilots* v. *Brown,* 698 F.2d 536, 551 (D.C. Cir. 1983), the court of appeals stated that to estop the government, the traditional elements of estoppel must be present as well as " 'a showing of an injustice . . . and lack of undue damage to the public interest.' *Hoeber* v. *District of Columbia Redevelopment Land Agency,* 483 F. Supp. 1356, 1365-66 (D.D.C. 1980), *aff'd mem.,* 672 F.2d 894 (D.C. Cir. 1981)."

A slightly different approach has been taken in the First Circuit, which has held that "courts undeniably have the power to estop the government" when the traditional elements of estoppel are present and where there is a minimal "risk, through estoppel, that a government official will, in effect, 'waive' congressionally enacted public policy." *Best* v. *Stetson,* 691 F.2d 42, 44 (1st Cir. 1982). The First Circuit's approach finds the touchstone of governmental estoppel in situations where the defense will not permit common errors and misstatements of government employees to abrogate duly enacted statutes and regulations. *Akbarin* v. *INS,* 669 F.2d 839, 844 and n.4 (1st Cir. 1982). The Seventh Circuit has applied no more than the traditional elements of estoppel. *Portmann* v. *United States,* 647 F.2d 1155 (7th Cir. 1982). Yet another line of cases permitting estoppel against the government is based on

the actual authority of a government official to act in a manner upon which a private party detrimentally relies. *E.g. Broad Avenue Laundry and Tailoring* v. *United States,* 681 F.2d 746 (Ct. Cl. 1982); *Molton, Allen and Williams, Inc.* v. *Harris,* 613 F.2d 1176 (D.C. Cir. 1980).

These decisions, although sharing certain common features, including considerable uncertainty as to the appropriate standards to weigh, cannot be harmonized with the narrow, threshold approach of the Temporary Emergency Court of Appeals that looks to "affirmative misconduct" as the touchstone of the inquiry. This case presents an opportunity for the Court to resolve the conflict of the TECA decision with those of other circuits, to enunciate the test for governmental estoppel, and to elaborate on the "balancing test" earlier set forth in the *Community Health Services* decision.

II. A FEDERAL ADMINISTRATIVE AGENCY SHOULD HAVE NO INHERENT AUTHORITY BLITHELY TO UNDERMINE THE RIGHTS AND LIABILITIES ESTABLISHED FOR PRIVATE PARTIES BY STATE LAW WHERE THERE IS NO STATUTORY BASIS THEREFOR AND WHERE THE ONLY JUSTIFICATION OFFERED IS "ADMINISTRATIVE CONVENIENCE"

The agency ordered C&W to make "restitution" of all the excess sums found to have been received by the Unit's working interest owners, plus interest. The agency did not contest that petitioner *never* received all the sums at issue. Rather than proceed against the proper parties, however, it determined, solely for the sake of "administrative convenience," to create a new common law federal claim that finds no support in the agency's own regulations and indeed is inconsistent with the statutes enacted by Congress.

The federal statutes upon which the agency relied do not even hint that Congress intended to impose joint and several liability.[20] The Unit Operating Agreement specifically disclaims joint and several liability. These significant legal impediments did not, however, stop first the agency and then the court of appeals from ordering petitioner to make "restitution" of all the excess sums found to have been received by the Unit's other working interest owners.[21] The agency and later the court of appeals found that their creation of new obligations and ancillary implicit rights were justified by administrative convenience and the mere existence of regulatory authority over petitioner.[22]

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[20] In the Economic Stabilization Act (ESA) and in the Emergency Petroleum Allocation Act (EPAA), Congress provided three distinct remedies. Section 209 of the ESA provided for restitutionary relief at the behest of the agency. Section 210 of the ESA, 12 U.S.C. § 1904 note, adopted by the EPAA, 15 U.S.C. § 754(a)(1), provided a direct action in federal district court "for appropriate relief, including . . . damages" to "any person suffering legal wrong because of any act or practice arising out of this title." Where appropriate, the EPAA, in 15 U.S.C. § 754(a)(3)(A), also provided for civil penalties. *Nowhere did Congress provide for a "restitutionary" remedy sounding in tort and carrying with it the onus of joint and several liability.*

[21] Before the district court, the agency urged that C&W would not be prejudiced by the imposition of joint and several liability because it could seek contribution from the other interest owners. This would require implication of a right of contribution. *But see Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630 (1981) (no right of contribution under Sherman and Clayton Acts); *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77 (1981) (no right of contribution under Equal Pay Act and Title VII).

[22] The agency made much of the fact that C&W was, within the meaning of the agency's regulations, an "operator." The mere fact, however, that an agency's regulations may invest the agency with regulatory jurisdiction does not suffice to justify the imposition of joint and several liability among regulated parties.

The district court was clearly troubled by the agency concession that it would be feasible to join the few additional owners, who were equally subject to administrative action. "Since they [the other working interest owners] [had] not been given notice and opportunity to respond . . . the court [did] not feel it [was] proper to hold C&W liable for their share of the overcharges and by so doing subject these other owners to possible liability to C&W for contribution." App. at 18a. It held that the only way to resolve the quandary was to impose liability on C&W only to the extent of the C&W owners' participation in the Unit. To that end, the district court held that petitioner should only be liable for 80% of the overcharged amount since the two owners of C&W, Messrs. Christmann and Welborn, received such sums.[23]

The Temporary Emergency Court of Appeals, however, set aside that ruling and held C&W liable for 100% of the claimed amounts. The court of appeals relied only on its own decision in *Sauder* v. *DOE,* 648 F.2d 1341 (Temp. Emer. Ct. App. 1981).[24] In *Sauder,* the court of appeals apparently was

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[23] In *United States* v. *National Bank of Commerce,* ___ U.S. ___, 53 U.S.L.W. 4856 (June 26, 1985), the Court was confronted with the issue whether the Internal Revenue Service may levy upon a joint bank account for payment of delinquent federal income taxes owed by only one of the co-depositors. In its 5 to 4 decision, the Court sanctioned an IRS administrative levy, but only because "[c]rucially, the administrative levy . . . is only a provisional remedy" specifically approved by Congress after carefully balancing "the interest of the Government in the speedy collection of taxes against the interest of any claimants to the property . . . ." 53 U.S.L.W. at 4860. Both the majority and the minority opinions expressed special concern about the rights of the other co-depositor whose property rights were adversely affected. Here, DOE has fabricated a nonexistent "joint account" and holds petitioner entirely liable to pay monies received by others. All this is in the absence of any congressional authority.

[24] *Sauder* in turn relied on *Tenneco Oil Co.* v. *FPC,* 442 F.2d 489 (5th Cir. 1971), ignoring the fact that under the Natural Gas Act, but not under any of the statutes implicated here, the holder of a certificate was the "administrative agent of the Commission" and a "license holder responsible for . . . those who operate with his permission." *Id.* at 497.

concerned with the allegedly "heavy burden on the agency" if it were required to seek restitution from individual beneficiaries of alleged overcharges (648 F.2d at 1348), in this case the Unit owners. The court of appeals ignored the salient fact that the agency itself determined in this case that it was entirely feasible to join the other working interest owners, but precluded them from even appearing. App. at 18a. Moreover, the Unit was formally created by a state regulatory authority, the legal relations between the owners were defined by state law [25] under which the respective Unit owners retain title to the mineral rights and in-kind share of the Unit's production [26] and in an action for a restitutionary remedy they would be severally, but not jointly, liable.[27] The court of appeals' terse holding that "[t]he rule developed in *Sauder* . . . controls this case" (App. at 8a) simply ignores the uncomfortable fact that it is for Congress and not the courts or administrative agencies to create new rules of liability, particularly when important state principles are implicated.

It is undisputed that Congress, had it chosen to do so, could have preempted limitations on liability imposed by state law. But Congress did not do so in the Economic Stabilization Act.

"[I]n such a case it becomes necessary to refer to some body of law, either federal or state, to determine the existence of these underlying legal relations." 1A J. Moore, W. Taggart &

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[25] *See* Merrill, *The Legal Status of a Statutory Oil and Gas Production Unit,* 10 Okla. L. Rev. 249 (1957).

[26] *See* E. Kuntz, *A Treatise on the Law of Oil and Gas,* ch. 78 (1972), *reprinted in* Institute for Energy Development, *Pooling and Unitization* 93 (G. Hardy, ed. 1980).

[27] This petition does not seek to challenge the agency's authority to order restitution, even though the statute provides only that a "court" is so empowered. Nor does it challenge the agency's definition of the term "operator." Rather, it submits that Congress's grant to the agency of regulatory authority over a person or an entity does not amount to an express or implied grant of authority to the agency to impose *joint and several liability on that party.*

J. Wicker, Moore's Federal Practice ¶ 0.319 (2d ed. 1981). Where the statute provides for "restitution of moneys received," property interests are clearly implicated, and where property law defines the underlying legal relations of parties, courts applying federal law look to state law to determine liability. *United States* v. *Standard Oil Co.,* 332 U.S. 301 (1947); *Folsom* v. *United States,* 306 F.2d 361 (5th Cir. 1962).

The Temporary Emergency Court of Appeals ignored this precept. It displaced the state law defining underlying property interests and, by fixing the entire liability for overcharges on petitioner without any statutory authority, in effect created a federal common law tort action, together with its adjunct of joint and several liability, to be employed as an enhancement of the agency's statutory authority.

No justification, beyond mere administrative convenience, can be or has been proffered for the decision, by an "unelected federal judiciary," entirely unsupported by explicit or implicit congressional authority, blithely to "make decisions about which state policies it favors and which ones it dislikes" [28] and thereby to " 'devour the essentials of state sovereignty.' " [29] The court of appeals' disregard of state law governing the relationship among the parties and its steps to fashion in effect a new federal tort as a means of circumventing limitations imposed by the state and left undisturbed by Congress should be set aside by the Court.

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[28] *Cf. Garcia* v. *San Antonio Metropolitan Transit Auth.,* ____ U.S. ____, 105 S. Ct. 1005, 1015 (1985).

[29] *Id.* at 105 S. Ct. 1016, *quoting Maryland* v. *Wirtz,* 392 U.S. 183, 205 (1968) (dissenting opinion).

CONCLUSION

The Court should grant this petition for a writ of certiorari to review the opinion and judgment of the Temporary Emergency Court of Appeals in this case.

Respectfully submitted,

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APPENDIX

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

TECA No. 5-109
TECA No. 5-110

CHRISTMANN & WELBORN,
Appellant and Cross-Appellee,

v.

DEPARTMENT OF ENERGY, *et. al.,*
Appellees and Cross-Appellants.

Appeal from the United States District Court
for the Northern District of Texas
Docket No. CA-5-79-7

March 29, 1985

Before ESTES, POINTER, and SEAR, Judges:

PER CURIAM.

This litigation involves the legality of charging "new oil" prices for production from the CWC Prentice Unit, a partial unitization of the Glorietta and Clearfork reservoirs.[1] The unitization became effective September 1, 1973, and covered eight leases in Yoakum and Terry Counties, Texas, all of which had production and sales of crude oil in 1972. Christmann & Welborn (C&W), a joint venture between John J. Christmann and J. M. Welborn, was the designated operator of the unit and controlled 80% of the working interest.[2]

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[1] Application of the two-tier pricing system to unitized properties is discussed in *Grigsby v. DOE*, 585 F.2d 1069 (TECA 1978), *cert. denied*, 440 U.S. 908 (1979), and *Pennzoil Co. v. DOE*, 680 F.2d 156 (TECA 1982), *cert. dismissed*, 459 U.S. 1190 (1983).

[2] The remaining 20% was held by the Cherry family and Bonanza Oil Company.

On August 24, 1973, John Christmann was allegedly told by Duke Ligon, an official of the Department of the Interior, that for price control purposes the new Unit would be a separate and distinct "property" with a Base Period Control Level of zero, thereby permitting the entire production to be sold at "new oil" prices.[3] Appellants contend that, based on this statement—which, they assert, constituted the most authoritative advice available at that time—they decided to continue to sell production to Shell Oil Company rather than enter into a processing agreement with a third party.[4]

Although it began after a period to pay the higher prices, Shell disagreed with C&W's classification of the production as new oil and in August 1974 it formally requested an interpretation from the Federal Energy Administration. In February 1975 the FEA advised Shell that the Base Period Control Level of the unitized property would be the sum of the BPCLs of the individual component leases. This response was formally published on August 29, 1975, as Ruling 1975-15, 42 Fed. Reg. 40832 (Sept. 4, 1975).[5] Nevertheless, based on C&W's prior undertaking to be responsible for certification, Shell continued to remit to C&W on the basis of "new oil" prices.

In December 1977 a Remedial Order was issued to C&W, finding that it had sold crude oil for more than the maximum lawful price and requiring it to refund these overcharges with interest. In December 1978 the Office of Hearings and Appeals

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[3] Christmann and Ligon (who is no longer with the government) differ over the details of this conversation. For purposes of summary judgment, however, Christmann's account must be taken as accurate.

[4] C&W asserts that, but for this advice, it would have entered into the processing agreement and would have received higher net income than that derived from selling the production to Shell at "old oil" prices.

[5] C&W asserts that it did not learn of this ruling until December 1975.

entered a Decision and Order affirming, with minor modifications, the Remedial Order. On January 12, 1979, C&W and the Department of Energy entered into a Stipulation of Stay and Escrow Agreement pending judicial resolution of the dispute.

On January 31, 1979, C&W filed its complaint in this action seeking to invalidate the Order and obtain declaratory relief upholding its pricing of the Unit's production. In addition to the federal defendants, C&W also joined the other working interest owners, asking that they pay their proportionate share of any overcharges that might be determined.[6] The United States counterclaimed on behalf of the DOE, seeking to enforce the Order. In July 1981 the DOE moved for partial remand, suggesting that the portion of the Order requiring refund of overcharges to a specific refiner be remanded to the DOE for reconsideration in light of decontrol.

Proceedings were stayed pending a decision from this court in *Pennzoil Co. v. DOE,* 680 F.2d 156 (TECA 1982), *cert. dismissed,* 459 U.S. 1190 (1983), regarding the validity of Ruling 1975-15. Following the opinion in *Pennzoil,* the District Court granted summary judgment in favor of the federal defendants. After a series of additional motions the District Court ultimately certified on June 22, 1984, as a final judgment that directed C&W to pay 80% of the previously determined overcharges, with interest at the rate established in the Order. The court also directed that the case be partially remanded for consideration of the proper distribution of the overcharge in the light of decontrol and that C&W account for overcharges after the cutoff date involved in the Remedial Order. C&W appealed. The governmental defendants cross-appealed.

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[6] C&W also made claims against Shell under the Texas Consumer Protection-Deceptive Trade Practices Act. These claims were subsequently resolved and are not before the court on this appeal.

ISSUES

The issues on appeal, as paraphrased from C&W's brief, are as follows:

1. Is the DOE estopped from contesting C&W's pricing of production from the CWC Prentice Unit?[7]

2. May Ruling 1975-15 be applied "retroactively" in this case?

3. Did the District Court err in partially remanding this case to the agency for consideration of the appropriate remedy in light of decontrol?

4. Did the District Court err in requiring C&W to furnish an accounting for any overcharges after September 1, 1976?

The issues on cross-appeal, as taken from the brief of the DOE and the United States, are as follows:

1. Did the District Court err in not holding C&W as the operator who caused the overcharges liable for the full amount of those overcharges?

2. Did the District Court err by not ordering "market" interest rates?

ESTOPPEL

C&W seeks to bind the DOE to a statement allegedly made by Ligon, an employee of the Department of the Interior, following the conclusion of a symposium on the then newly-adopted price control regulations. As a general proposition, of course, those dealing with governmental officials take "the risk

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[7] C&W's challenge to the jurisdiction of this court regarding the question of estoppel is without merit. *United States v. Wickland*, 619 F.2d 75 (TECA 1980).

of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority." *Federal Crop Ins. Corp. v. Merrill,* 332 U.S. 380, 384 (1947). Ligon had no statutory or regulatory authority to bind the government. He was not even an official of the agency that issued or enforced the regulations, and, indeed, the regulations provided that any agency interpretation had to be in writing.[8] 6 C.F.R. § 155.2, 38 Fed. Reg. 21983 (Aug. 15, 1973), *recodified,* 10 C.F.R. § 205.2.

The Supreme Court has recently held that

> "when the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined. It is for this reason that it is well settled that the Government may not be estopped on the same terms as any other litigant." *Heckler v. Community Health Services of Crawford,* ____ U.S. ____, 104 S. Ct. 2218, 2224 (1984).

C&W argues that a different standard applies if there is no threat to the public fisc, citing *Schweiker v. Hansen,* 450 U.S. 785 (1981). It does not, however, cite the Supreme Court's decision the following year in *I.N.S. v. Miranda,* 459 U.S. 14, 19 (1982), where the Court noted,

> "It is true that *Hansen* relied on a line of cases involving claims against the public treasury. But there was no indication that the Government would be estopped in the absence of the potential burden on the public fisc."

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[8] C&W argues that no written interpretations could in fact have been obtained and that Ligon, acting in a liaison capacity from the Department of Interior and the Department of the Treasury, was among the most knowledgeable persons in government regarding the new regulations. In essence, it contends that it got the best advice that could be obtained at the time from any governmental source. These assertions, even if assumed as correct for purposes of the summary judgment motion, do not however support its claim of estoppel. The fallacy in C&W's position is its erroneous hypothesis that one is entitled to obtain from some governmental source an advisory opinion that will be binding on the government.

As was true with the immigration laws discussed in *Miranda,* the pricing regulations at issue in this litigation involved matters of broad public policy, whether or not the public fisc was directly threatened.

The Supreme Court has left open the possibility of estoppel in the event of " 'affirmative misconduct' on the part of the Government." *See I.N.S. v. Hibi,* 414 U.S. 5, 8 (1973); *I.N.S. v. Miranda, supra,* 459 U.S. at 19; *Schweiker v. Hansen, supra,* 450 U.S. at 788. C&W has conceded in oral argument, however, that it makes no such claim in this case.

In *Pennzoil v. DOE, supra,* 680 F.2d at 171, this court refused to bind the government on the basis of advice by agency employees. In the present case involving the *oral* comments made in good faith by an official of *another* agency, the same conclusion is certainly no less compelled. The District Court properly granted summary judgment against C&W's claim of estoppel.

RETROACTIVITY

C&W claims that the lower court erred in viewing *Pennzoil v. DOE, supra,* as upholding the retroactivity of Ruling 1975-15 in its entirety. This contention is without merit. Although the specific issue in *Pennzoil* was whether, when a unit consisted of several leases that were unitized in 1973, the unit should be treated under the Ruling as the "property" for purposes of the price control regulations, implicit in that dispute was the question whether the Base Period Control Levels of the constituent leases should, as required by the Ruling, be carried over to the new property. *Pennzoil* upheld the validity of the Ruling, and the District Court in the present case properly granted summary judgment against C&W's attack upon that Ruling.

REMAND

After the Remedial Order but before final judgment, crude oil was decontrolled. This constituted a dramatic change of circumstances, and the District Court did not err in partially remanding the case to the DOE for reconsideration of the remedy in the light of decontrol. The only issue to be considered by the DOE under this remand will be the proper distribution of the overcharges and interest.

ACCOUNTING

C&W asserts that it cannot comply with the directive of the District Court requiring it to account for overcharges after September 1, 1976, the cutoff date of the period covered by the Remedial Order. There is nothing in the record or the briefs that tends to support this contention, factually or legally.

LIMITATION OF LIABILITY

The District Court set aside the agency's determination requiring C&W to pay the entire amount of overcharges and instead directed that C&W be responsible only for 80% of those amounts. We agree with the federal defendants that this ruling was in error. Dealing with a similar case where the operator of the unitized tract caused the overcharges, this court stated,

> "In these circumstances, we think that it is within the authority and discretion of the agency to hold the owner-operator of a lease liable for the full amount of the overcharge. To require the agency to seek refunds from each individual property owner would place a heavy burden on the agency, limiting its ability to repair infractions of its pricing rules. Shifting the burden to one in Sauder's position of responsibility aids the task of enforcement without working unfairness." *Sauder v. DOE,* 648 F.2d 1341, 1347-48 (TECA 1981).

The rule developed in *Sauder*—in which the operator owned substantially less of the working interest than does C&W here—controls this case, and on remand the District Court should in its judgment direct that C&W pay the full amount of overcharges and interest.

INTEREST

The District Court acted within its discretion in deciding that prejudgment interest should be calculated in accordance with the agency's order rather than, as requested by the federal defendants, a "market" rate. Postjudgment interest shall be calculated under 28 U.S.C. § 1961.

CONCLUSION

The order of the District Court is REVERSED insofar as it does not require C&W to account for overcharges attributable to the working interests not owned by it. In all other respects it is AFFIRMED. The costs of this appeal are taxed against C&W.

CHRISTMANN & WELBORN,
a joint venture between
John J. Christmann and J. M. Welborn,
Plaintiffs,

v.

DEPARTMENT OF ENERGY, *et al.,*
Defendants.

Civ. A. No. CA-5-79-7.

United States District Court,
N. D. Texas,
Lubbock Division.

June 22, 1984.

MEMORANDUM ORDER AND FINAL JUDGMENT

WOODWARD, Chief Judge.

On June 19, 1984, a hearing was held on all pending motions in the above-entitled and numbered cause and the court, after considering the pleadings, administrative record, motions, briefs and supporting documents and affidavits of all the parties and the argument of counsel, enters the following memorandum and order:

I

This action was commenced by the plaintiff, Christmann and Welborn, a joint venture between John J. Christmann and J. M. Welborn, (C&W) against the Department of Energy (DOE)[1] and various government officials to challenge a final Decision and Order issued by DOE on December 12, 1978. C&W also brought claims against Shell Oil Company, which were subsequently dismissed by an agreed motion of C&W and

[1] The acronym "DOE" will be used to include the Economic Regulatory Administration Office of Hearings and Appeals and DOE's predecessor agencies, the Federal Energy Administration, Cost of Living Council and Federal Energy Office.

Shell. In addition, C&W sought contribution from the other owners of working mineral interests.

In the administrative proceedings reviewed by this court, DOE had determined that C&W violated the Mandatory Petroleum Price Regulations, 10 C.F.R. Part 212, by charging its customer Shell Oil Company a price in excess of that permitted by the ceiling price rule, 10 C.F.R. § 212.73 for domestic crude oil from an enhanced recovery unit operated by C&W. This unit, the CWC Prentice Unit, had been formed effective September 1, 1973, from eight separate leases, all of which had production and sales of crude oil during 1972. DOE concluded in its Remedial Order that C&W's treatment of the unit as having a zero base production control level (BPCL) and its sales of all crude oil from the unit from March 1974 through August 1976, resulted in overcharges to Shell in the amount of $3,367,990.92. C&W was ordered to make restitution in such amount to Shell and to recalculate allowable revenues from crude oil sales produced from the unit to Shell for the period September 1976 to the date of the remedial order and make restitution of that excess also. The remedial order further directed C&W to pay interest amounts and maintain records to show compliance (R. 32-33, 404).

In the present proceeding, both C&W and DOE sought summary judgment, and on December 20, 1982, the court granted the government's motion, affirming the administrative Decision and Order in all respects except the appropriate remedy, which was remanded to DOE for consideration in light of decontrol. In the December 20th order, C&W was directed to pay into an escrow account the amounts required by a Stipulation of Stay, which C&W had entered into on January 29, 1979. C&W was also ordered by the court to pay into the escrow account interest amounts, which had accrued since the date of the Stipulation, and to furnish within 90 days an accounting to DOE of all overcharge amounts from September 1, 1976 through January 27, 1980. C&W's claims against the nongovernment defendants were severed.

Several post-judgment motions were filed, and on March 17, 1983, the court granted in part one of C&W's motions for reconsideration, relieving C&W of liability for the overpayments made to the other interest owners.[2] In a second order of the same date, the court directed C&W to furnish to the court and opposing counsel by April 18, 1983, a complete statement and accounting, showing the amount of monies that had accrued under the original escrow agreement, which then was to be reduced to C&W's percentage of interest alone.

II

The motions, which remain pending and which shall be disposed of here, are C&W's Motion to Stay Escrow Requirement, DOE's Motion for Reconsideration of the Court's Order of March 17, 1983, C&W's Motion for Relief from Final Order, and DOE's Motion to Strike Certain Affidavits.

For the reasons below, the court is of the opinion that all motions should be and the same are hereby DENIED, except C&W's Motion to Stay Escrow Requirement which is granted in part as discussed below.

III

A.

The court's order of December 20, 1982, granting DOE's motions for partial summary judgment and for partial remand was grounded on *Pennzoil v. Department of Energy*, 680 F.2d 156 (TECA 1982), in which the Temporary Emergency Court of Appeals found that Ruling 1975-15 simply made explicit

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[2] John Christmann and J. M. Welborn, along with the Anna Mae Welborn Estate administered by J. M. Welborn, held 80 percent of the working interest in the CWC Prentice Unit. The other working interest owners were Florence S. Cherry, J. Blair Cherry, Jr. Trust, Rosemary Cherry Patterson Trust, Helen G. Cherry, A. W. Cherry Trust, and Bonanza Oil Company.

what was implicit in the property definition in the regulations from the beginning and therefore was retroactively applicable. The *Pennzoil* court refused to apply estoppel against DOE. *Id.* at 176-77; *also see id.* at 161 and n. 8.

C&W's basic objection to the previous disposition of this case is the court's refusal to apply equitable estoppel against DOE under the facts and circumstances of this case. C&W contends that *Pennzoil* is distinguishable on the grounds that at the time Mr. Christmann was advised by Duke Ligon, there were no procedures to obtain formal written opinions, that in reliance on Mr. Ligon's advice C&W forewent another arrangement by which it could have realized the equivalent of new oil prices, that the CWC Prentice Unit was C&W's sole property and thus C&W did not treat any other properties differently, and that Mr. Ligon's advice was the only advice C&W had and it therefore did not ignore conflicting opinions. In its motion for relief C&W argues that it has newly discovered evidence which allegedly will show that Mr. Ligon was one of just a few individuals qualified to provide interpretations of the crude oil pricing regulations, that one of his official functions was to do so, and that the government intended for the oil and gas industry to rely on Mr. Ligon's advice. C&W also asserts in its motion for relief that DOE brought the remedial action in bad faith to harass Mr. Christmann because he was a prominent spokesman for the oil industry and the head of a powerful independent lobby group.

DOE, on the other hand, objects to the court's determination that C&W be relieved of liability for the other working interest owners' share of the overcharges. DOE contends that the equitable bases for the court's order of March 17, 1983, are no longer valid, pointing out that the *Sun* decision on which the court had relied, *Sun Company, Inc.*, 10 DOE ¶ 82, 542 (1983), has since been reversed, DOE Case Nos. HRR-0445 and HRD-0122 (September 2, 1983). DOE cites *Sauder v. DOE*, 648 F.2d 1341 (TECA 1981), in support of holding C&W fully

liable for all overcharges, including those which went to these other interest owners, because C&W, as the operator of the unit, priced the oil. DOE contends that C&W's fiduciary duty to its co-interest owners required it to set a price in accordance with the regulations. In another motion, DOE seeks to have stricken from the record all of the affidavits submitted by C&W with its motion for relief on the grounds that they do not constitute new evidence, are untimely, are not part of the administrative record, are irrelevant and scurrilous, contain legal opinions, are not properly sworn or certified, or were submitted in violation of government regulations.

B.

C&W's estoppel argument has been rejected before, not only in the administrative proceedings (R.27-28, 399-400) but also implicit in this court's prior rulings (orders of December 20, 1982 and March 17, 1983). It must be rejected again for a number of reasons. In the Decision and Order, the Office of Hearings and Appeals noted that C&W failed to communicate directly with the agency involved and additionally that C&W knew its contention was subject to serious legal question and in fact contrary to the viewpoint of Shell's lawyers (R.400). C&W's knowledge that Mr. Ligon's advice was questionable is clearly borne out by Mr. Christmann's own statements in the record. In a letter dated August 24, 1973, he wrote Shell:

> Having discussed this specific case with one of the Railroad Commissioners and some of the government people in Dallas, I am advised that on the basis of our necessary capital expenditures to accomplish additional recoveries and the fact that the CWC Unit has no production record prior to September 1, 1973, we *may contend* that any oil produced by said CWC Unit is NEW OIL, and not subject to the price on May 15th plus 35 cents per barrel.

(R. 63 (emphasis added)). Mr. Christmann wrote Shell again on October 18, 1973, asserting that due to the increased operating costs in obtaining secondary recovery from the unit,

C&W would get no increase in revenue if it were limited to old oil prices. He then reiterated it was C&W's "contention" that it was entitled to the new oil price (R. 65).

The record further shows that contrary to C&W's present allegation that Mr. Ligon's advice was the only advice it had to rely upon, Shell advised C&W otherwise. On January 11, 1974, a Shell representative wrote Mr. Christmann "As explained to you over the phone, our interpretation of the Cost of Living Council's instructions does not allow us to classify your CWC Unit . . . as new oil based on the fact that we did run oil from individual wells making up the unit during 1972. . . ." (R. 68). Shell did not begin paying the new oil price until March, 1974 (R. 22). C&W admits the procedures to obtain written interpretations were available in 1974. In light of the facts of this case then, whether written opinions were available in 1973 becomes irrelevant.[3] Furthermore, *Pennzoil* made it clear Ruling 1975-15 "simply made explicit what was implicit in the property definition from the beginning." 680 F.2d at 176 (footnote deleted). DOE's General Counsel in fact responded on five occasions during 1974 and early 1975 to requests from companies for formal agency interpretations applying the property definition in the context of a unitization. *Id.* at 162-63.

C&W's "intent" argument and affidavits in support also must be rejected in light of *Pennzoil.* The Temporary Emergency Court of Appeals refused to accord much if any weight to the memories of former agency officials or employees, *id.* at 161, and this court must do likewise. Official written interpretations were available in at least 1974, *id.* at 162, and the meaning of the property definition was always implicit within the regulations themselves, *id.* at 161 and 176.

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[3] It should also be noted that C&W is unable to show it was unsuccessful in an attempt to obtain a written interpretation during the latter part of 1973 or early 1974, because it never attempted to obtain a written interpretation at all.

Additionally and perhaps most importantly, estoppel is generally not available against the government in any event. "When the [g]overnment is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined." *Heckler v. Community Health Services of Crawford County, Inc.* ____ U.S. ____, at ____, 104 S.Ct. 2218, 2224, 80 L.Ed.2d ____ (1984).[4] In *Heckler,* the Supreme Court rejected the private party's detrimental reliance argument. The Court noted that the party's only detriment was its inability to retain money it never should have received in the first place. *Id.,* ____ 104 S.Ct. at 2224. The Court also noted that there is no requirement that the government anticipate every problem that may arise in administering a complex governmental program. Finally, the Court pointed out that the party's reliance was "further undermined because the advice it received . . . was oral." The Court said:

> It is not merely the possibility of fraud that undermines our confidence in the reliability of official action that is not confirmed or evidenced by a written instrument. Written advice, like a written judicial opinion, requires its author to reflect about the nature of the advice that is given to the citizen, and subjects that advice to the possibility of review, criticism and reexamination.

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[4] The key concept here is that it is the *public* (not its agent the government) which is the party that may not be estopped by incorrect advice or opinions of its officials. This is especially true where the advice or opinion is inconsistent with positive law, such as the regulations involved in this case. It is critical to recall that the Temporary Emergency Court of Appeals found that Ruling 1975-15, which specifically applied to C&W's situation, simply made explicit what was implicit in the regulations themselves. *Pennzoil,* 680 F.2d at 176. In other words, the plain meaning of the regulations in question always precluded C&W's interpretation that the oil could be classified as new oil. According to *Pennzoil,* C&W's contention and Mr. Ligon's opinion were simply always wrong.

Id., ____, 104 S.Ct. at 2227.

Even though C&W contends that had it not been for the advice given by Mr. Ligon, C&W would have pursued another course which would have entitled it to obtain new oil prices, estoppel still cannot be applied against the government under the facts and circumstances of this case. As mentioned earlier, Shell advised C&W through Mr. Christmann that Shell disagreed with C&W's contention it could charge new oil prices. Although Mr. Ligon was a highly placed government official, his own personal intent that his advice be relied upon cannot bind the government, particularly the DOE, in any way, nor can other former government officials' personal opinions as to intent of an agency bind the government. *See Pennzoil,* 680 F.2d at 161. Additionally, the advice was oral and insufficient in any event. *See Heckler v. Community Health Services,* ____ U.S. at ____, 104 S.Ct at 2227. One final point is that Mr. Christmann, who made the decision to charge the new oil prices, was a prominent spokesman for the oil industry, president of a major oil and gas lobbying group (Brief in Support of Plaintiff's Motion for Relief from Final Order, at 16), and therefore clearly a sophisticated oil field operator. As stated by the *Pennzoil* court:

> There is simply no basis in the circumstances of the present case to find unreasonableness, unfairness, or any other element of estoppel in applying the agency interpretation to the relevant period in question here. The Supreme Court has declined to recognize an estoppel against the United States under more appealing facts involving applicants for social security benefits or citizenship. Much less would we be inclined to do so on the facts here presented in favor of sophisticated oil field operators exploring the possibility of dubious regulatory leeway without even requesting an official interpretation.

680 F.2d at 176-77 (footnote deleted). *See also Department of Energy v. Louisiana,* 690 F.2d 180 (TECA 1982), in which the court said:

> Plaintiffs knew they were using a different interpretation in determining whether the oil being produced was old or new. They never sought an agency interpretation to sustain their position. Rather, they seem to have proceeded on the theory that their interpretation was reasonable and that it would afford them protection against such a claim as now being made by DOE. This, of course, is no defense. The history of the regulations, rulings and interpretations demonstrates that there was no justification for their position.

Id. at 191.

C&W's claim that DOE had a political vendetta against Mr. Christmann is no more than mere speculation. That he was given *Miranda* warnings evidences only that the government was following standard procedure when a violation of law is found in order to safeguard the accused's constitutional rights (and thereby the government's case) in the event criminal proceedings are later deemed warranted. In addition, the affidavits from the L. O. Ward case have absolutely no relation to the case at hand. To allow a party to concoct a defense of political vendetta on such tenuous grounds[5] as those submitted by C&W here would virtually preclude the government from pursuing its enforcement proceedings, a result this court cannot permit.

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[5] The political vendetta theory is actually not a new assertion by C&W. A review of the pleadings and evidence in this case shows that C&W previously questioned Jimmy W. Mayberry, manager of DOE's Midland office at the time of the audit of C&W, whether he knew Mr. Christmann was president of the Texas Independent Producers and Royalty Owners Association during the time of the investigation and Mr. Mayberry testified, "I don't think we even knew it" (Oral Deposition of Jimmy W. Mayberry, at 256-57). This evidence counsels toward rejection of C&W's insinuations of a political vendetta.

C.

The court is also of the opinion that the limited equitable relief afforded to C&W in the Order of March 17, 1983, is proper. Although C&W clearly is not entitled to equitable estoppel against the government, the equitable relief concerning the other co-interest owners' share of the overcharges is grounded not on estoppel but on constitutional considerations. In its Decision and Order, DOE recognized that in view of the small number of working interest owners, it would have been feasible to join each of them in the proceedings (R. 402). Some of the other working interest owners notified DOE on several occasions that C&W did not represent them and had no authority to enter into any agreements on their behalf (R. 108, 109). Others notified C&W through counsel that they had defenses separate and apart from those asserted by C&W in the DOE action (R. 110-12). More importantly, these parties were totally precluded by DOE from any participation in any of the administrative proceedings and on one occasion DOE refused to allow them to attend a hearing despite the fact they had gone to the time and expense to attend. Instead, they were relegated to waiting outside without any opportunity to participate. C&W, in contrast, as a party to the administrative action, had full opportunity to present its defenses and have such considered before DOE issued the remedial order. DOE's contention is that C&W may seek contribution from the other co-interest owners, but here, there were few enough owners not to put an excessive burden on DOE in its administrative proceedings, and they should have been included. Since they have not been given notice and opportunity to respond at the administrative level, the court does not feel it is proper to hold C&W liable for their share of the overcharges and by so doing subject these other owners to possible liability to C&W for contribution. DOE is not precluded from pursuing these other owners independently of this case should it wish to do so.

D.

In its order of December 20, 1982 this court ordered C&W to comply with the parties' stipulation concerning an escrow account. Apparently only one payment was made by C&W to the account. Neither C&W nor DOE reported to the court or applied for a suspension of the order or for the enforcement thereof until briefs and pleadings were filed by the parties subsequent to the December 20, 1982 order.

The court grants the motion of C&W to Stay Escrow Requirement for the following reasons:

1. This court can only assume that the failure to fund the escrow account was at least implicitly done with the assent of DOE since no timely motion for enforcement was made after C&W failed to pay the installments as required.

2. Earlier this year, C&W and Shell entered into a settlement agreement and submitted an agreed motion to dismiss Shell from this dispute, and the court entered its order of dismissal on February 3, 1984. This occurrence provides additional support for the partial remand to DOE for reconsideration of the remedy.

The settlement of the claims between Shell and C&W, the terms of which are unknown to this court, will possibly alter C&W's liability in this case, making the original order establishing the escrow account inapplicable insofar as the amount of the escrow account may be altered by plaintiffs' settlement.

Therefore, the remand to DOE is made not only in the light of decontrol but also in light of the settlement, and such remand will afford DOE an opportunity to reconsider or amend its remedial order with respect to the remedy.

E.

In light of the above discussion and determinations, any remaining motions are therefore denied.

IV

Therefore it is the Final Order and Judgment of this court that:

A. C&W's Motion for Relief from Final Order which is also considered as a motion to re-open under Rule 60(b), Federal Rules of Civil Procedure, is DENIED.

B. DOE's Motion for Reconsideration of the Order of March 17, 1983 is DENIED. C&W will not be ordered to account for or refund the overcharges, if any, which were paid to Florence S. Cherry, J. Blair Cherry, Jr. Trust, Rosemary Cherry Patterson Trust, Helen G. Cherry, A.W. Cherry Trust, or to Bonanza Oil Company.

C. DOE's Motion to Strike Certain Affidavits is DENIED, even though the admission of same is doubtful under Rules 56(e) and 60(b), Federal Rules of Civil Procedure. But consideration of these affidavits does not alter the judgment of this court.

D. (1) C&W's Motion to Stay Escrow Requirement is GRANTED and this case is remanded to DOE for the purpose of reconsidering its final remedial order of December 12, 1978 or issuing a new Decision and Order in accordance with this court's previous judgment of December 20, 1982 and this court's order of March 17, 1983, and with this order. In considering the issues on remand DOE shall consider the effects, if any, of decontrol and the effects, if any, of the settlement between C&W and Shell.

(2) The previous order of this court that C&W furnish an accounting to DOE is hereby suspended. It is, however, ordered that the accounting to DOE by C&W as ordered by this court on December 20, 1982, shall be furnished to DOE within 120 days after this judgment has become final.

E. In the original remedial order of DOE against C&W the following paragraph appears with respect to interest:

> "Compute interest on the aforementioned refunds and make restitution to Shell of this interest amount. Simple interest will be computed at the rate of 6% per annum on refunds due from the date of the overcharges due from July 1, 1975 through January 31, 1976, and at the rate of 7% per annum on refunds due from February 1, 1976 through January 21, 1978 and at the rate of 6% per annum from February 1, 1978 and thereafter until the overcharges are fully refunded."

The court finds no basis upon which to change the amount of interest as set forth in the above paragraph. It is here ordered that any findings of overcharges that may be determined by DOE upon remand shall bear interest in accordance with the above paragraph, and the court's judgment of December 20, 1982 is amended accordingly.

It is further Ordered and Adjudged that the relief prayed for by the plaintiffs in their original complaint is in all things denied, except as above amended, and that this action is dismissed with prejudice, and that the defendants, Department of Energy, Secretary of Energy, and Economic Regulatory Administration and its Administrator, recover of the plaintiffs their costs of action.

This Order and Judgment confirms the judgment of December 20, 1982 and the order of March 17, 1983, and this order shall constitute the Final Judgment of this court which is appealable.

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

CHRISTMANN & WELBORN,
Plaintiffs,

v.

DEPARTMENT OF ENERGY, *et al.*,
Defendants.

CIVIL ACTION NO.
CA-5-79-7

ORDER

The court has before it plaintiffs' motion for reconsideration of its orders of December 20, 1982 and January 24, 1983 in the above-styled case, together with brief in support thereof. Defendants have replied to said motion by letter dated February 10, 1983, as requested by the court. The court has reviewed these materials and the authorities cited therein, and enters the following order:

It is undisputed that certain officials of the Department of Energy made statements to officials of Christmann & Welborn to the effect that the BPCL on the unit in question would be zero. In view of the representations made by responsible officials of the Department of Energy (DOE) to officials of Christmann & Welborn (C&W) concerning a possible zero BPCL for the unit in question, C&W should *not* be responsible for any overpayments to its other co-interest owners. The same types of equitable considerations which governed the Department of Energy's decision in the *Sun Company, Inc.* case, DOE Case No. HRZ-0117, February 2, 1982, should control in this

case as well. The operators of the unit, plaintiffs herein, were under a duty to their co-interest owners to sell their oil for the best permissible price, and failure to do so would have been a breach of such duty. The court recognizes that an official of a governmental agency cannot ordinarily bind that agency by his unofficial statements, but the circumstances herein are such that the principles governing in the *Sun* case are equally applicable here.

The plaintiffs' motion to reconsider, filed February 1, 1983, is hereby granted but only insofar as it applies to the question of the liability of C&W for any overpayments made to the other interest owners. The court's order of December 20, 1982 is hereby amended to the effect that Christmann & Welborn shall *not* be liable to defendants for overcharges attributable to its other co-interest owners. Except insofar as this order denies the liability of C&W for overcharges attributable to their co-interest owners, this order does not affect that portion of the order of December 20, 1982 which remanded the issue of remedy to DOE for further consideration in light of decontrol. In all other respects the plaintiffs' motion to reconsider, filed February 1, 1983, is hereby denied.

Except insofar as it is inconsistent with the above, the court's order of December 20, 1982 is hereby reaffirmed.

To the extent that it conflicts with this order, the court's order of January 24, 1983 is hereby vacated.

The requests of the parties as contained in their stipulation filed with the clerk of this court on March 11, 1983 are hereby granted to the extent hereinabove set forth.

The attorneys for Christmann & Welborn and the Department of Energy will confer and prepare a judgment sufficient under Fed. R. Civ. P. 54(b) and 28 U.S.C. § 1292(b) to certify the following for appellate review: (1) the issue of the liability of C&W for overcharges paid to their co-interest owners, and (2) any and all other issues disposed of by the court's order of

December 20, 1982, save that of the appropriate remedy insofar as the remedy issue has been remanded to DOE. This proposed judgment shall be circulated among the attorneys for all parties herein and shall be filed with the court in Lubbock, Texas on or before April 18, 1983.

It is so Ordered.

The clerk will furnish a copy hereof to each attorney.

ENTERED this 17th day of March, 1983.

/s/ HALBERT O. WOODWARD

Halbert O. Woodward
Chief Judge
Northern District of Texas

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

CHRISTMANN & WELBORN, a joint venture between John J. Christmann and J. M. Welborn,
Plaintiffs,

v.

DEPARTMENT OF ENERGY, *et. al.*,
Defendants.

CIVIL ACTION NO.
CA-5-79-7

ORDER

The court has received and considered the motion by the plaintiffs for a new trial or to alter or amend the judgment, and has considered the briefs in support of and in opposition thereto.

The court notes that the plaintiffs have duly given notice of appeal to the Temporary Emergency Court of Appeals of the United States by notice filed January 17, 1983.

After considering the above, the court is of the opinion that the motion of the plaintiffs for a new trial or to alter or amend the judgment should be and the same is hereby denied.

The Clerk will furnish a copy hereof to each attorney.

ENTERED this 24th day of January, 1983.

/s/ HALBERT O. WOODWARD

Halbert O. Woodward
Chief Judge
Northern District of Texas

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

CHRISTMANN & WELBORN,
Plaintiffs,

v.

DEPARTMENT OF ENERGY, et al.,
Defendants,

UNITED STATES OF AMERICA,
Counterclaimant,

v.

JOHN J. CHRISTMANN and
J. M. WELBORN d/b/a
CHRISTMANN & WELBORN,
Counterclaimant-Defendants.

CIVIL ACTION NO.
CA-5-79-7

O R D E R

This matter came before the Court on the motions of the United States and the Federal Defendants for summary judgment, a preliminary injunction, and a partial remand. Upon consideration of these motions, the arguments in support thereof and opposition thereto, the applicable law, and the record herein, and it appearing that there is substantial evidence in the record to support the findings of the agency, it is this 20th day of December, 1982

ORDERED that the motion of the United States and the Federal Defendants for summary judgment is granted;

ORDERED that the motion of the Plaintiffs-counterclaimant defendants for summary judgment is denied;

ORDERED that the motion of the Counterclaimant United States of America for an injunction requiring Plaintiffs to comply with their January 29, 1979 Stipulation of Stay with the Department of Energy to escrow the amount of the alleged overcharges is granted;

ORDERED that Plaintiffs-counterclaimant defendants, within ninety (90) days of this order, shall pay into the escrow fund the amounts required by the Stipulation of Stay, including interest payments designated in that agreement through January 12, 1979, and interest payments thereafter at the average prime rate compounded quarterly. The applicable prime rate for each calendar quarter shall be the arithmetic mean, to the nearest one hundreth of one percent, of the prime rate published in the Federal Reserve Bulletin for the fourth, third, and second months preceding the first month of the calendar quarter. *See* 46 Fed. Reg. 21412 (April 10, 1981).

ORDERED that Plaintiffs shall, within ninety (90) days of entry of this order, furnish to Defendants an accounting of all overcharge amounts from September 1, 1976 through January 27, 1981.

ORDERED that the Decision and Order of the Department of Energy is affirmed in all respects, except that it is remanded to the DOE for consideration of the appropriate remedy in light of decontrol.

It is further ORDERED that the complaints by the Plaintiffs against Shell Oil Company; Florence S. Cherry; J. Blair Cherry, Jr. Trust; Rosemary Cherry Patterson Trust; Helen G. Cherry; A. W. Cherry Trust; and Bonanza Oil Company are hereby severed and such severed causes of action against these Defendants shall bear Cause No. CA-5-79-007A.

Nothing herein shall be construed as a bar to the right of any of the Defendants and the Plaintiffs to be heard and participate in the proceedings in connection with the remand of this cause to the Department of Energy for consideration of the appropriate remedy in light of decontrol.

The Clerk will furnish a copy hereof to each attorney.

ENTERED and DATED this 20th day of December, 1982.

/s/ HALBERT O. WOODWARD

Halbert O. Woodward
Chief Judge
Northern District of Texas

Department of Energy
Washington, D.C. 20461

Dec. 12, 1978

DECISION AND ORDER OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner:	Christmann & Welborn
Case Number:	DRA-0101
Date of Filing;	January 4, 1978

On January 4, 1978, Christmann & Welborn (C&W) filed an Appeal from a Remedial Order that had been issued to it by the Department of Energy, Region VI on December 22, 1977. The Remedial Order found that C&W had improperly treated a unitized crude oil producing property as a "new property" even though the components of the unitization had produced crude oil during 1972. As a result, the Remedial Order found that, during the period March 1974 through August 1976, C&W improperly classified all crude oil produced from the CWC Prentice Unit as new oil and charged prices for that crude oil which were in excess of the ceiling price established by 10 CFR 212.73. Based on this finding, and in order to remedy the violation cited, C&W was ordered to refund $3,367,990.72 in overcharges plus interest to Shell Oil Company, the purchaser of the crude oil. The C&W Appeal, if granted, would result in the rescission of the Remedial Order.

C&W is the operator of the CWC Prentice Unit, located in Yoakum County, Texas. The Unit was formed when the Texas Railroad Commission approved a unitization of eight individual leases, effective September 1, 1973. Consequently all crude oil which was produced from these properties in 1972 was produced and sold from the eight component leases. The

unitization, which was intended to enhance production of crude oil from the leases, permitted the conversion of producing wells on the edge of the field to injection wells in which chemically treated water is forced into the wells under high pressure. Through this means the crude oil remaining in the reservoir is moved toward a producing well.

THE APPLICABLE REGULATIONS

As a producer of crude oil, C&W is subject to the provisions of 10 CFR, Part 212, Subpart D. Prior to February 1, 1976, Subpart D required crude oil producers to determine the first sale price of domestic crude oil produced and sold from a specific property by referring to the base production control level (BPCL) for that property, i.e., the amount of crude oil produced and sold from the property in the corresponding month in 1972. Crude oil production which did not exceed the base production control level for the corresponding month in 1972 ("old oil") was generally subject to the ceiling price rule set forth in Section 212.73, while crude oil production which exceeded the base production control level for that month and any deficiency which had accumulated could be sold without regard to any ceiling price.

The provisions of Subpart D were amended on February 1, 1976 in order to effectuate the crude oil pricing policy specified in Section 401 of the Energy Policy and Conservation Act (the EPCA). Those amendments established a two tier pricing mechanism applicable to all first sales of domestic crude oil. Under this system, old crude oil must be sold pursuant to the lower tier ceiling price rule set forth in Section 212.73, while new crude oil may be sold pursuant to the upper tier ceiling price rule set forth in Section 212.74. The determination of the quantity of crude oil which could be sold without regard to the ceiling price rule prior to February 1, 1976 and the quantity of crude oil which may currently be sold pursuant to the upper tier ceiling price rule is made with reference to the historical production of crude oil from the property concerned. The term

"property" is defined in Section 212.72 as "the right to produce domestic crude oil, which arises from a lease or from a fee interest." For a general discussion of Subpart D, see *Grigsby Oil & Gas Co.* 4 FEA Par. 83,024 (1976).

For most crude oil producers, the application of the property concept to their operations is relatively straightforward. If there has been no restructuring of the right to produce crude oil since 1972, the amount of crude oil which may be sold as new and released oil from a particular property is determined by comparing current production to the production levels which prevailed for the same property in 1972. However, when there has been a restructuring since 1972—such as the unitization effected by C&W in this case—the property which now produces crude oil did not exist in that same form in 1972. To clarify the effect of the property rule in such cases, the FEA issued Ruling 1975-15 on September 4, 1975, stating:

> Because of the need to quantify the 1972 monthly production levels for a particular property in order to calculate that property's base production control level for each month, the producer must refer to the right to produce crude oil as it existed in 1972 in order to define the property involved. This is dictated, of course, by the need to compare like quantities, today and in 1972 in order to ensure a meaningful application of the new and released provisions.
>
> * * *
>
> In the case of a property that was unitized after calendar year 1972, the need for comparison of like quantities requires the producer in computing the BPCL to measure and total the individual 1972 monthly production levels for each of the leases that now comprise the unit. Accordingly, for example, where a unit consists of several leases that were unitized in 1973, the property consists of the unit, and the BPCL is the total 1972 monthly production from all of the several leases that now comprise the unit. Under no circumstances, therefore, would a post-1972 unitization create a "new" property, *i.e.*, one that has no BPCL. 2 CCH Federal Energy Guidelines Par. 16,055, p. 16,121.

Hence, the BPCL for a property such as the CWC Prentice Unit, which was unitized after calendar year 1972, is the total 1972 monthly production from all of the several leases that now comprise the unit.

ANALYSIS OF THE C&W CONTENTIONS

1. Definition of Property

In its Appeal, C&W contends that, under the rules and regulations in effect during the period in which the alleged violation took place, the CWC Prentice Unit became a property when it was unitized in 1973 and that since the Unit was not in existence during 1972, the BPCL for that property is zero. In support of this contention, C&W argues that: (i) Ruling 1975-15 is invalid because it was an improper attempt to issue a regulation that changed prevailing rules and practices without complying with the rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, and (ii) even if Ruling 1975-15 was valid at the time of issuance, Ruling 1977-2 invalidated the relevant portion of Ruling 1975-15.

We do not agree with these contentions. As C&W suggests, if Ruling 1975-15 created new law then it would have had to comply with the rulemaking requirements of the Administrative Procedure Act (APA). However, interpretive rulings are specifically exempted from the rulemaking requirements of the APA by 5 U.S.C. Sec. 553(b). See *Energy Reserves Group v. DOE 4 CCH Federal Energy Guidelines,* Par. 26,112 (1978), *Mike Kahn,* 2 DOE Par. _____ (September 26, 1978), cases in which similar arguments were raised concerning Rulings 1974-29 and 1975-12. Since Ruling 1975-15 merely interpreted the manner in which existing regulations applied to properties restructured subsequent to 1972, it was an interpretive ruling that did not depart from well established law or practice.

We also are not persuaded by C&W's argument that Ruling 1975-15 created new law. The firm's argument is based

on the contention that a press release issued by the Cost of Living Council (see 38 F.R. 22536, August 22, 1973) indicates that the CLC intended to provide an incentive for enhanced production by authorizing a zero BPCL for unitized properties. The relevant portion of the press release upon which C&W relies states:

> Rule: A two tier pricing system is provided. Producers will have the opportunity to sell "new oil"—that above 1972 production levels—at free market prices.
>
> Reason: The "2-tier" pricing system, which allows new oil to be sold at higher prices than "old oil" is expected to stimulate domestic crude oil production while maintaining price controls on oil presently being produced. The "two-tier" system will encourage increased investment in domestic exploration and will provide an economic incentive to allow the recovery of a larger percentage of oil in existing reservoirs. (CLC Press Release No. 362, August 10, 1973.)

In its Appeal, C&W argues that, given the existing price differentials between old and new oil and the naturally declining rate of production of crude oil properties, producers would have to be permitted to treat *all* production subsequent to unitization as new oil or there would have been no effective incentive for enhanced production through unitization.

This argument is without merit and is not supported by the CLC press release. CLC's desire to balance the need to create incentives for increased production with the need to restrain prices was recognized in the introductory language to the August 10, 1973 press release, quoted in the following portion of Ruling 1977-1, *CCH Federal Energy Guidelines* Par. 16,065 at p. 16,165:

> The Council has been very concerned that the final regulations strike a balance between constraining prices while at the same time encouraging the necessary increase in supplies which the country must have. . . .

Furthermore, the plain words of the "Rule" focus on 1972 production since it specifies that "new oil" is crude oil which is produced "above 1972 production levels."

In addition, the reading suggested by C&W would mean that enhanced recovery projects not involving unitization would be treated less favorably than those involving unitization. Yet, both projects could result in increased production of oil and therefore should be affected by the same incentives. Furthermore, as stated in *Grigsby* v. *Department of Energy,* Temporary Emergency Court of Appeals of the United States, No. 5-28, October 5, 1978, at p. 9:

> If . . . the nature of the ownership interest alone controlled the definition of "property," a mineral lessee could evade the price control and allocation programs by pooling his interest with that of neighboring lessees and gerymandering the situs of the well among the various leaseholds.

The interpretation advanced by C&W has been rejected by the DOE on at least two occasions, in addition to the *Grigsby* case, which was just cited. In *Pruet & Hughes Company,* 3 FEA Par. 83,116 (1976), the DOE denied exception relief from the requirement that the firm use a unit BPCL equal to the combined BPCL's of the component properties as they existed in 1972. In addition, in *Florida Gas Exploration Company,* 1 DOE Par. 80,196 (1978), we pointed out that the price regulations required that the producer involved calculate a single BPCL for a unitized property by aggregating production from two component leases. *Compare Inexco Oil Company,* 4 FEA Par. 85,049 (1976), stating that a unitized property was not entitled to a zero BPCL but that the precise manner in which Inexco should calculate its BPCL was so unclear that it was appropriate to issue a stay of certain regulatory requirements pending the issuance of a ruling then under consideration.

Consequently, we conclude that Ruling 1975-15 is a correct interpretation of the regulations, that it did not create new law

and that it was therefore not subject to the rulemaking requirements of the Administrative Procedures Act.

C&W also contends that Ruling 1975-15 has been rescinded retroactively by Ruling 1977-2. This contention too is without merit. Ruling 1977-2, 2 Federal Energy Guidelines Par. 16,066 at p. 16,201 acknowledges that FEA, on February 1, 1976 rescinded

> that part of the Ruling [1975-15] which required producers of unitized properties to total all the BPCLs of the participating leases and to treat the unit as a single property *as of the date of unitization.* Instead, producers of unitized properties were permitted to continue to determine quantities of upper tier crude oil on a lease-by-lease basis until the actual implementation of enhanced recovery operations or until such time as there has been "a significant alteration in producing patterns," whichever ocurred first. (Emphasis added).

Accordingly, the effect of Ruling 1977-2 upon Ruling 1975-15 is very minor. It never addressed the argument that a property should have a zero BPCL after unitization; indeed, it assumed that however the leases in a property are aggregated that it is necessary to assign a BPCL other than zero and the only issue is what date a unitized property should be required to change the method of computing its BPCL.

2. Reasonable Reliance

C&W also argues that, in determining that the CWC Prentice Unit had a BPCL of zero, it justifiably relied on: (i) advice given to it by the Director of the Office of Oil and Gas (U.S. Interior Department) at a symposium held to explain the Cost of Living Council's Phase IV two tier pricing system for domestic crude oil; and (ii) the inaction of the Cost of Living Council and FEA after Shell Oil Company advised the CLC that is was paying new oil prices to C&W.

In order to understand these arguments, it is helpful to review the circumstances which existed in 1973 and 1974. At

the Department of Interior symposium, held on August 24, 1973, Mr. John J. Christmann, the principal working interest owner of C&W, claims to have developed a belief that all of the crude oil produced by the CWC Prentice Unit after unitization could properly be classified as new oil. C&W has submitted a recent letter from the Department of Interior official responsible for the symposium, supporting the claim that the subject of crude oil produced from unitized properties was discussed. However, the letter disclaims the official's ability to recall "the precise details of our conversation." After the Interior Department symposium, C&W wrote to Shell Oil Company informing it that "we contend that any oil produced by [the] . . . CWC Unit is NEW OIL . . . . " In response, Shell did not accept C&W's interpretation and, on January 11, 1974, it advised C&W that "our interpretation of the Cost of Living Council's instructions does not allow us to classify your [production from the] CWC Unit in the Prentice Field . . . as new oil based on the fact that we did run oil from individual wells making up the unit during 1972." However, Shell agreed to pay the new oil price, stating that it would advise the Cost of Living Council of the matter. Shell began paying the new oil price on March 1, 1974. According to C&W, it did not receive any further information concerning the position of the CLC, the FEA, or Shell until December 1975.

We conclude on the basis of these facts that it was not justifiable for C&W to rely on advice or inaction of government officials. The FEA and the DOE stated on a number of occasions that "unless other strong countervailing factors exist in a case it would adhere to the principle of refusing to recongnize oral advice which a firm alleges it received as ratifying conduct which is unlawful under federal regulation." See *Tenneco Oil Company,* 6 FEA Par. 80,508 (1977) and cases cited therein. In the present case, C&W has not shown convincingly that it received specific oral advice from an official of the Interior Department on which it relied. Nor can it claim that the period of silence which followed C&W's communication with Shell could reasonably be interperted as acquies-

cence. In fact, C&W never itself directly communicated with the agency involved. It is a well-established principal that firms have an obligation to be cognizant of the application of federal regulations to their activities. *Carlos R. Leffler, Inc.*, 2 FEA Par. 80,640 (July 18, 1975). Furthermore, C&W knew that its contention was subject to serious legal question and that lawyers for Shell held a viewpoint which was different from its interpretation.

3. Liability of C&W as a Producer

C&W also argues that it is improper for the DOE to hold it, as operator of the CWC Prentice Field, liable for the full amount of the alleged violation. First, it argues that it did not "sell" the full amount of the oil from the unit because it did not act as agent for the other owners of working interests in the Unit. Second, it argues that the other working interest owners were not joined as parties to the proceeding, that they may have separate defenses not being fully presented in these proceedings and that it may not be possible for C&W to obtain payments from the other working interest owners for their proportionate share of the alleged overcharges.

The arguments presented by C&W have in large part been fully considered and rejected by the DOE in prior decisions. See e.g., *Ponderosa Oil Co.*, 1 DOE Par. 80,237 (1978) and *Braden-Zenith, Inc.*, 6 FEA Par. 80,510 (1977). As we stated in the *Ponderosa Oil Company* case:

> As the operator and the party responsible for extracting the crude oil from the properties, Ponderosa clearly satisfies the definition of "producer" for the entire production of crude oil from the properties at issue in the Remedial Order. Under these circumstances, the DOE was clearly acting within its authority in issuing the Remedial Order to Ponderosa and finding the firm responsible for the full amount of the overcharges.
>
> * * *
>
> In determining the most effective course of action to adopt in order to achieve the objectives of a remedial order, *viz.*

> to eliminate the effect of the overcharges and make restitution to the purchasers who paid unlawful prices for the crude oil produced and sold from the properties, the DOE Regional Office must consider a number of factors, including: the number of parties owning interests in the properties involved, the relationship between the operator and the other interest owners and the financial position of the operator. *Ponderosa Oil Co., supra,* at p. 81,229.

Subsequently in the same Decision, in the course of citing with approval a prior decision in *Braden-Zenith, Inc.,* 6 FEA Par. 80,510 (1977), the DOE stated:

> In view of the degree of control which the operator exercises, the FEA generally presumes that the operator who established the prices at which the crude oil was sold should also bear the responsibility for refunding any overcharges which resulted from the prices which it set. However, the presumption that a Remedial Order should generally be issued to the operator with respect to all overcharges may be rebutted by a showing that under the particular factors present in the case under consideration it would be unduly burdensome to require the operator to discharge the full refund obligation. The burden of making any such showing rests with the operator. *Braden-Zenith, Inc., supra,* at pp. 80,561-2, cited in *Ponderosa Oil Company, supra,* at p. 81,229.

In the present case, C&W has failed to rebut the presumption described in the *Ponderosa* decision. The record in this proceeding indicates that there are only seven individuals, in addition to C&W, which own major working interests in the CWC Prentice Unit. In view of the relatively small number of working interest owners it would have been administratively feasible for the Office of Enforcement to join each owner in the proceedings. However, C&W has not shown that the Office of Enforcement abused its discretion in choosing not to do so. Although C&W has represented that "each owner of an interest in oil production separately markets his own share of that production," letters and notes submitted as exhibits A through

E to C&W's reply to the Notice of Probable Violation issued to it in June 1977 indicate that C&W had primary responsibility in pricing the crude oil produced from the Unit. These materials reveal that C&W engaged in price negotiations on behalf of the entire interests of the CWC Prentice Unit with Shell and with Charter International Oil Co. Furthermore, C&W has failed to show that its financial position will be impaired by the requirement that it refund the full amount of the overcharges for which it was responsible.

C&W also contends that this proceeding is defective because the other working interests were not formally joined as parties to the enforcement proceeding. It is certainly preferrable as a general matter to provide individual notice at each stage of an enforcement proceeding to working interest owners so that they may participate if they wish. Nevertheless, there has been no showing in this case—either by C&W, which enjoys a close business relationship with the other working interest owners, or by those owners themselves—that there has been any actual harm resulting to the working interest owners or any hardship which C&W may reasonably expect to suffer as the result of the lack of service. All working interest owners have been kept informed of each stage of this appeal proceeding and have been given an opportunity to comment on all submissions and to attend a hearing held on August 10, 1978 regarding the C&W Appeal. Accordingly, even if there was a procedural defect at an earlier stage of this proceeding, it has been cured on appeal.

4. Extent of Liability

C&W argues that the Remedial Order improperly requires it to make recalculations and restitution for a period subsequent to August 1976. This contention is based on C&W's position that the DOE failed to find any violation during subsequent periods. Ordering Paragraph (2) of the Remedial Order states:

> 2. Recalculate, pursuant to applicable FEA regulations, allowable revenues from sales of crude oil produced from

the CWC Prentice Unit to Shell for the period September 1976 through to the date of receipt of this Remedial Order and make restitution by refund to Shell of an amount which represents revenues by C&W in excess of those allowable during this period.

We find that it is appropriate to require the recalculation of revenues for the period from September 1976 to the date of receipt of the Remedial Order because the history of C&W's treatment of its BPCL as zero and its claim in this proceeding that the practice was correct suggests a strong likelihood of overcharges subsequent to September 1976. In view of this paragraph of the Remedial Order, C&W had notice that its violation was of a continuing nature, and it was incumbent on C&W to assert that it did not continue its pricing practices subsequent to September 1976. C&W has not made this assertion, and it is therefore appropriate to assume that the overcharges continued.

However, we also find that it is inappropriate at this time to require restitution for any period subsequent to September 1976 because the DOE has not yet made a specific finding of violations during any such period. Ordering paragraph 2 of the Remedial Order will therefore be modified to eliminate the requirement that refunds must necessarily be made.

5. Other Alleged Inaccuracies and Omissions

In the course of these proceedings, C&W has also alleged that improper service was made on it, that there are factual inaccuracies in the Remedial Order and that the Remedial Order did not adequately deal with C&W's grievances against Shell, whose alleged wrongdoing is said to be sufficient to result in the rescission or modification of the Remedial Order.

Even if C&W's contentions were correct, none of the alleged innaccuracies and omissions is sufficient to affect the validity of the Remedial Order. The purpose of service is to give notice of the proceedings, and it is clear from the record that C&W obtained actual notice of the enforcement proceed-

ing and participated in each stage. With respect to the factual innacuracies alleged by C&W, none is material to the validity of the Remedial Order. Furthermore, nothing in the record of this case indicates wrongdoing by Shell. C&W's allegation that Shell's actions prevented it from finding a different purchaser who would pay a higher price for its crude oil is entirely without merit since the ceiling price rule would have been equally applicable to sales of C&W's crude oil to any other purchaser.

Based on these considerations, the Department of Energy finds that C&W has failed to demonstrate that the Remedial Order is erroneous in fact or law or that it is arbitrary or capricious, except that Ordering Paragraph (2) should be modified for reasons discussed above.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed by Christmann & Welborn from a Remedial Order issued to it by the Department of Energy on December 22, 1977 is denied except as set forth in Paragraph (2) below.

(2) Ordering Paragraph (2) of the Remedial Order is amended to read as follows:

> 2. Recalculate, pursuant to applicable FEA and DOE regulations, allowable revenues from sales of crude oil produced from the CWC Prentice Unit to Shell for the period September 1976 through the date of this Remedial Order and, in the event C&W finds that overcharges did ocur, make restitution by refund to Shell of the amount which represents revenues received by C&W in excess of those allowable during this period.

(3) This is a final Order of the Department of Energy of which any aggrieved party may seek judicial review.

/s/ MELVIN GOLDSTEIN

Melvin Goldstein
Director
Office of Hearings and Appeals

Date: Dec. 12, 1978

SUPREME COURT OF THE UNITED STATES

No. A-830

CHRISTMANN & WELBORN,
Applicant,

v.

DEPARTMENT OF ENERGY, *et al.*

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 16, 1985.

/s/ WARREN E. BURGER
Chief Justice of the United States

Dated this 6th
day of May, 1985

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

TECA No. 5-109

CHRISTMANN & WELBORN,
a joint venture between
John L. Christmann and J. M. Welborn,
Plaintiff-Appellant,

v.

DEPARTMENT OF ENERGY, *et al.*,
Defendants-Appellees.

Before ESTES, POINTER and SEAR, Judges.

ORDER DENYING PETITION FOR REHEARING

Having carefully considered the petition for rehearing filed by the Plaintiff-Appellant, Christmann & Welborn, the court determines that such petition is without merit; and it is hereby DENIED.

The mandate shall issue April 24, 1985.

FOR THE COURT:

/s/ DONNA M. BOLD

Donna M. Bold
Clerk

April 17, 1985

Certificate of Service

I hereby certify that on this 16th day of July, 1985, three copies of the Petition for Writ of Certiorari were mailed, first class postage prepaid, to:

Solicitor General
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Washington, D.C. 20530

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I further certify that all parties required to be served have been served in accordance with subsections .3. and .4.(a) of Supreme Court Rule 28.

/s/ JEFFREY A. BURT

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Counsel for Petitioner

Supreme Court, U.S.
FILED
SEP 10 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-81 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1985

CHRISTMANN & WELBORN, PETITIONER

v.

UNITED STATES DEPARTMENT OF ENERGY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that petitioner could not equitably estop a federal agency on the basis of an oral representation by an official of another agency.

2. Whether the court of appeals correctly held that petitioner was liable for all of the crude oil overcharges that it caused.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-81

CHRISTMANN & WELBORN, PETITIONER

v.

UNITED STATES DEPARTMENT OF ENERGY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is not yet reported. The memorandum of the district court (Pet. App. 9a-21a) is reported at 589 F. Supp. 576. The decision of the Department of Energy (Pet. App. 29a-41a) is reported at 2 D.O.E. ¶ 80,194.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1985, and a petition for rehearing was denied on April 17, 1985 (Pet. App. 43a). On May 6, 1985, the Chief Justice granted petitioner's request for an extension of time until July 16, 1985, to file a petition for a writ of certiorari, and the petition was filed on that date. The jurisdiction of this Court is invoked under Section 211(g) of the Economic Stabilization Act of 1970 (ESA), 12 U.S.C. (1976 ed.) 1904 note, as incorporated by Section 5(a)(1) of the Emergency

Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 87 Stat. 633.[1]

STATEMENT

1. Petitioner is the operator of a unitized crude oil producing property. The unit was formed in September 1973 by combining eight pre-existing oil and gas leases. Petitioner controls 80% of the working interest in the unit. Pet. App. 1a.

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[1]The petition for a writ of certiorari appears to be jurisdictionally out of time. Section 211(g) of the ESA, 12 U.S.C. (1976 ed.) 1904 note, provides in pertinent part:

> Within thirty days after entry of any judgment or order by the Temporary Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a United States court of appeals as provided in section 1254 of title 28, United States Code * * *.

Although the rehearing petition was denied on April 17, 1985, the petition for a writ of certiorari was not filed until July 16, 1985. The time limits established by Congress for petitioning for certiorari are jurisdictional. *Department of Banking* v. *Pink*, 317 U.S. 264 (1942).

Petitioner did obtain an extension of time for filing a petition in this case. However, neither Section 211(g) nor 28 U.S.C. 1254 explicitly authorizes such an extension of time. The general time provision for filing a certiorari petition in a civil case, 28 U.S.C. 2101(c), does permit extensions of up to 60 days, but that subsection also grants a litigant an initial 90-day period in which to file a petition. It is most unlikely that Congress intended the 90-day initial period of Section 2101(c) to be inapplicable to Temporary Emergency Court of Appeals (TECA) cases, as it surely is in light of Section 211(g), yet to allow the 60-day extended period to be applied in such cases. Indeed, if the availability of a 60-day extension is implied, the purpose of substituting a 30-day time limit for the 90-day time limit of 28 U.S.C. 2101(c)—*i.e.*, to expedite review of TECA cases (see S. Rep. 92-507, 92d Cong., 1st Sess. 10 (1971))—would be substantially defeated. See *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 825-826 (1980).

Shortly before the unit became effective, a predecessor agency to the Department of Energy (DOE)[2] promulgated Phase IV price controls for domestic crude oil pursuant to the Economic Stabilization Act of 1970, 12 U.S.C. (1976 ed.) 1904 note. See 6 C.F.R. Pt. 150, Subpt. L (1974); see also 10 C.F.R. Pt. 212, Subpt. D (1975) (regulations as repromulgated under the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 751 *et seq.*). These controls instituted a two-tier pricing mechanism designed to dampen the inflationary spiral in crude oil prices without eliminating the economic incentives for increasing domestic production. In general terms, the two-tier system provided that production in each month that did not exceed the "base production control level" (BPCL) for the property, defined as production from the same property in the same month in 1972, was "old oil" subject to a controlled price, while production in excess of the BPCL was "new oil" that could be sold at market prices. See 6 C.F.R. 150.354 (1974); 10 C.F.R. 212.72 (1975).

In 1975, DOE published a ruling addressing the computation of the BPCL for units, like petitioner's, formed after 1972. Ruling 1975-15, 40 Fed. Reg. 40832. Reiterating the position it had taken earlier,[3] DOE explained that a unit's BPCL was "the total 1972 monthly production from all of the several leases that now comprise the unit" (*ibid.*). The agency rejected the position advanced by petitioner that the

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[2]Hereafter, we will use DOE to refer to its predecessor agencies as well as to the Department itself. The various agencies are set forth in *Pennzoil Co.* v. *DOE*, 680 F.2d 156, 161 & n.6 (Temp. Emer. Ct. App. 1982), cert. dismissed, 459 U.S. 1190 (1983).

[3]On five occasions in 1974 and early 1975, DOE responded to requests from individual companies for interpretations applying the regulation's definitions of BPCL and property in the context of unitization. Rulings 1974-22, 1975-2, 1975-4, 1975-10, and 1975-27, later published at 42 Fed. Reg. 23723, 23726, 23730, 23740, and 25659 (1977). See *Pennzoil Co.*, 680 F.2d at 162-163 & n.11.

BPCL for a unit was zero (allowing all of its production to be sold at the higher new oil prices) merely because the unit did not exist in that form in 1972: "[u]nder no circumstances * * * would a post-1972 unitization create a 'new' property, *i.e.*, one that has no BPCL" (*ibid.*). Ruling 1975-15 and its retroactive application were upheld in *Pennzoil Co.* v. *DOE*, 680 F.2d 156 (Temp. Emer. Ct. App. 1982), cert. dismissed, 459 U.S. 1190 (1983).

2. Beginning in 1974, petitioner sold all of the production from its unit at new oil prices. In 1977, DOE issued a remedial order to petitioner, finding that its prices exceeded the lawful maximum and requiring it to refund overcharges of $3.4 million plus interest. Pet. App. 2a-3a. On administrative appeal, petitioner defended in part on the ground that DOE was equitably estopped from enforcing the price control regulations. Petitioner based its estoppel argument on its allegation that Duke Ligon, while an official in the Department of the Interior, had told one of its joint venturers at a symposium in 1973 that he viewed the regulations as permitting the sale of all oil from newly unitized properties at new oil prices (*id.* at 36a).

The agency determined that petitioner could not estop the government because its reliance on Ligon's oral advice was not justifiable (Pet. App. 36a-37a). The agency also held petitioner liable for the full extent of the overcharges, including those attributable to the 20% of the working interest held by other owners, reasoning that petitioner "had primary responsibility in pricing the crude oil produced from the Unit" (*id.* at 39a).

3. a. Petitioner sought review in the United States District Court for the Northern District of Texas, and DOE counterclaimed to enforce its order. On cross-motions for

summary judgment, the district court affirmed DOE's order except as to the 20% of the working interest not held by petitioner (Pet. App. 9a-21a). In rejecting petitioner's estoppel argument, the district court, relying on *Heckler* v. *Community Health Services*, No. 83-56 (May 21, 1984), slip op. 13, concluded that Ligon's oral advice was "insufficient" to give rise to an estoppel (Pet. App. 16a) and that, as a sophisticated producer, petitioner should have been aware of the proper interpretation of the regulations (*id.* at 14a, 16a-17a). The district court limited petitioner's liability to its 80% working interest in the unit on the ground that it would not have been burdensome for the agency to join all of the owners in a single proceeding (*id.* at 18a). Finally, the district court remanded the case to DOE for reconsideration of the appropriate remedy in light of oil price decontrol and a settlement reached between petitioner and its purchaser (*id.* at 10a, 20a).

b. On cross appeals, the court of appeals ruled that DOE was not estopped from applying its regulations to petitioner and that the agency did not abuse its discretion in holding petitioner liable for all of the overcharges (Pet. App. 1a-8a). The court of appeals held that estoppel was unavailable because petitioner could not reasonably have relied on "the *oral* comments made in good faith by an official of *another* agency" (*id.* at 6a; emphasis in original). The court of appeals concluded that because petitioner "caused the overcharges" (*id.* at 7a) and seeking refunds from each owner would be unduly burdensome, DOE did not abuse its discretion by ordering petitioner to refund the full amount of the overcharges (*id.* at 7a-8a).

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Moreover, the decision is interlocutory because the

case has been remanded to the agency for reconsideration of the remedy.[4] Review by this Court is plainly unwarranted.

1. Petitioner contends (Pet. 10-20) that DOE should be estopped from enforcing its price control regulations because of Ligon's allegedly erroneous oral advice in 1973. As this Court has recently made clear, "however heavy the burden might be when an estoppel is asserted against the Government, the private party surely cannot prevail without at least demonstrating that the traditional elements of an estoppel are present." *Heckler* v. *Community Health Services*, No. 83-56 (May 21, 1984), slip op. 9. Both courts below found that petitioner had failed to satisfy this standard because its reliance on Ligon's advice was unreasonable. This factbound conclusion merits no further review.[5]

In *Community Health Services*, the Court set forth a number of reasons why persons may not justifiably rely on oral advice as a basis for estopping the government (slip op. 13):

> It is not merely the possibility of fraud that undermines our confidence in the reliability of official action that is not confirmed or evidenced by a written instrument. Written advice, like a written judicial opinion, requires

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[4]Because this case is interlocutory, there is no reason to hold the petition, as petitioner suggests (Pet. i n.*), for a petition to be filed in *United States* v. *Exxon Corp.*, No. DC-91 (Temp. Emer. Ct. App. July 1, 1985). Whatever action is taken in that case, petitioner will be able to protect its interests on remand here.

[5]Because petitioner did not satisfy the traditional elements of estoppel, this case presents no occasion for the Court to consider whether the government may ever be estopped and, if so, what facts a plaintiff must prove in addition to those required to estop a private party. See *Community Health Services*, slip op. 8-9. Contrary to petitioner's contention (Pet. 14), the court of appeals' decision rests not on the absence of affirmative governmental misconduct (although the court noted that factor), but on the absence of reasonable reliance (Pet. App. 5a-6a).

> its author to reflect about the nature of the advice that is given to the citizen, and subjects that advice to the possibility of review, criticism and reexamination. The necessity for ensuring that governmental agents stay within the lawful scope of their authority, and that those who seek public funds act with scrupulous exactitude, argues strongly for the conclusion that an estoppel cannot be erected on the basis of the oral advice [on which the plaintiff relied].

See also *Schweiker* v. *Hansen*, 450 U.S. 785 (1981) (refusing to estop government on basis of oral misrepresentation).[6] The fact that Ligon "was not even an official of the agency that issued or enforced the regulations" (Pet. App. 5a) makes petitioner's reliance on his oral advice all the more unreasonable.[7]

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[6]The agency, moreover, refused to credit petitioner's claim that the advice had in fact been given (Pet. App. 36a). Petitioner's contention (Pet. 6 n.5, 13 n.13, 15) that its reliance on Ligon's purported oral advice was reasonable because there was at the time no mechanism in place to obtain a written ruling was rejected in *Community Health Services*, slip op. 13 n.22 (even if the plaintiff "did all it could have done" to obtain authoritative advice, that "would not make [its] reliance * * * any more reasonable"). That public funds were at stake in *Community Health Services* does not distinguish the case in a material respect. See, *e.g.*, *INS* v. *Miranda*, 459 U.S. 14 (1982) (government not estopped from denying visa application). As with the immigration laws at issue in *Miranda*, oil price controls "implicat[e] matters of broad public concern," making estoppel inappropriate even "in the absence of [a] potential burden on the fisc" (*id.* at 19).

[7]Although petitioner often repeats its contention that the government designated Ligon as its "authoritative" spokesman (Pet. i, 3, 5, 6, 10, 11, 14), it does not suggest, beyond referring to Ligon's position, that DOE had in fact authorized him to make binding oral representations with respect to the agency's regulations. Even if Ligon's position did carry with it the authority to promulgate legally binding interpretative rulings, his oral remarks during a conversation at a symposium could

Finally, the proper application of the regulations to unitized property was inherent in the regulations even before Ruling 1975-15 was issued. *Pennzoil Co.* v. *DOE*, 680 F.2d 156, 168 (Temp. Emer. Ct. App. 1982), cert. dismissed, 459 U.S. 1190 (1983).[8] Petitioner's reading of the regulations would have allowed oil producers to evade price controls merely by redefining existing properties and designating their production as "new oil." Such "gerrymandering of boundaries undertaken to avoid price controls" (680 F.2d at 169), which would have "disrupt[ed] essential accepted agency functions in favor of self-serving choices of the regulated" (*id.* at 173), was barred by the regulations. It was quite obviously unreasonable for petitioner, which was "hardly an innocent abroad" (*id.* at 179), to rely on an oral statement that was inconsistent with the regulations as they stood at the time, regulations of which petitioner was bound to and did have notice. See *Community Health Services*, slip op. 12.

2. Petitioner also contends (Pet. 20-24) that it should be liable for only 80% of the overcharges, *i.e.*, those related to its working interest in the unit. The basis for its liability, however, is not, as petitioner contends (Pet. 20), solely administrative convenience. While the just and expeditious

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hardly be accorded the same weight as a duly issued opinion. In any event, at the time of Ligon's oral advice the regulations provided that interpretations of agency regulations must be in writing (see Pet. App. 5a). Petitioner's reliance on informal oral advice was therefore totally unjustifiable.

[8]In *Pennzoil Co.*, as here, the court of appeals held that it was unreasonable to rely on informal advice that unitized properties could sell all of their production at new oil prices (680 F.2d at 171-172). In arguing that the regulations in 1973 were ambiguous, petitioner relies (Pet. 13 n.14) on the concurring opinion in *Pennzoil Co.*, ignoring the court's opinion, which came to the contrary result. Even the concurring judge, moreover, concluded that reliance on unofficial interpretations of the regulations was not justified (680 F.2d at 180).

conclusion of enforcement proceedings under the now-defunct price control program would be impossible if the government were required to proceed separately against each of the sometimes thousands of parties with ownership interests in a particular property, the substantive basis for petitioner's liability was its position as the operator of the unit. As the court of appeals found, petitioner "caused the overcharges" (Pet. App. 7a). Petitioner made pricing decisions on behalf of all of the owners (*id.* at 39a). Its entire liability rests on its own misconduct, not that of others. No state-created rights have been displaced.

The court of appeals relied on its earlier decision in *Sauder* v. *DOE*, 648 F.2d 1341, 1347-1349 (Temp. Emer. Ct. App. 1981), in holding that operator liability for the full extent of overcharges in these circumstances is in accordance with the scheme established by Congress in the Emergency Petroleum Allocation Act of 1973 (Pet. App. 7a-8a). This conclusion by the Temporary Emergency Court of Appeals, "a court intimately familiar with the intricacies of federal energy regulation" (*Tully* v. *Mobil Oil Corp.*, 455 U.S. 245, 248 (1982)), is consistent with decisions of other courts of appeals in analogous contexts and warrants no further review. See *SEC* v. *Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1308 (2d Cir.), cert. denied, 404 U.S. 1005 (1971); *Tenneco Oil Co.* v. *FPC*, 442 F.2d 489 (5th Cir. 1971).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1985

DOJ-1985-09

FILED
SEP 27 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 8[illegible]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CHRISTMANN & WELBORN,
Petitioner,

v.

U.S. DEPARTMENT OF ENERGY, *et al.*,
Respondents.

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

The Brief for the Respondents in Opposition ("Response Brief") blithely ignores the following fundamental and dispositive facts:

1. The government sponsored a symposium in August 1973 for the *express announced purpose* of providing guidance to regulated firms regarding newly-issued regulations.

2. The government official upon whose advice petitioner relied was designated by the government as its *principal* spokesman at that symposium it sponsored, and the official was duly authorized to respond to inquiries.[1]

[1] "This symposium was sponsored by the Office of Oil and Gas, and I was its principal speaker." Affidavit of Duke R. Ligon on page 1433 of the Record on Appeal ("Rec.").

3. Both the official in question and the agency intended that petitioner and others similarly situated rely on the advice given at that symposium.[2]

4. The agency communicated to petitioner at that meeting the then-existing *official* policy of the Cost of Living Council as it applied to the specific circumstances presented by petitioner: ". . . the official policy of the Cost of Living Council, for whom I was a spokesman at the Dallas meeting, was that fields unitized for purposes of enhanced recovery would be considered to qualify for 'new oil' pricing." Ligon Aff. at Rec. 1434-35.

5. Petitioner's view of the regulations was hardly "inconsistent with the regulations as they stood at that time," as disingenuously stated by the government. The record below is clear: "The Oil Policy Committee and I were well aware that unless such fields were permitted to qualify for 'new oil' pricing, operators were not likely to invest the additional capital necessary to increase the oil flow from those fields. We believed this incentive crucial to expanding domestic supplies in a short time frame because enhanced recovery was the most expeditious method of increasing domestic oil supplies in short order." *Id.*

6. The foregoing policy remained the *official* view of the agency for the following two years, and the agency was well aware that petitioner was proceeding on that under-

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[2] The suggestion that Mr. Ligon was not authorized to speak for, or act on behalf of, the Cost of Living Council is sheer nonsense. Mr. Ligon served at the time as Executive Secretary of the Cabinet-level Oil Policy Committee and Chairman of the Working Group of the Oil Policy Committee. He stated that, "[i]n fulfilling my responsibilities at both the Treasury and Interior Departments as well as the Oil Policy Committee, I was one of the most senior government officials involved in setting policy for the Cost of Living Council regulations applicable to the oil and gas industry. When the Federal Energy Administration was created in December 1973, I was appointed Assistant Administrator for Policy Planning and Regulation. In that position, I was responsible for formulation of the crude oil price and allocation regulations promulgated by that agency." Ligon Aff. at Rec. 1433.

> standing. "The enhanced recovery pricing issue was discussed occasionally over the next year and a half that I was involved with the Cost of Living Council/FEA regulations applicable to oil production, but was not changed to my knowledge (and I was in a position to know of any such change), at any time prior to acceptance of my resignation in February 1975. Obviously, the policy embodied in Ruling 1975-15, issued on September 4, 1975, is different from the policy initially adopted by the Cost of Living Council." *Id.* at 1435.

The government makes much of the fact that the dispositive advice here was not in writing. Yet, they do not dispute that, at the government-sponsored symposium, petitioner "got the best advice that could be obtained at the time from any governmental source." Pet. App. 5a. "[I]n the fall of 1973, it would have been impossible for anyone in the petroleum industry to have obtained any sort of formal written interpretation of petroleum pricing regulations from the Cost of Living Council ("CLC"). Formal written interpretations were not being provided by any CLC personnel or, to my knowledge, by any other government officials." Affidavit of Sigmund L. Sklar, former Chief of the Case Analysis Branch of the Energy Division of the Cost of Living Council. Rec. at 1413.[3] This case hardly resembles *Schweiker* v. *Hansen,* 450 U.S. 785 (1981), where the Court was concerned with oral representations by hundreds, if not thousands, of Social Security Administration employees who received "untold numbers of oral inquiries" each year. Here, a senior government official acting with apparent, if not actual, authority provided specific guid-

[3] *See also* the Affidavit of the agency's former Regional Director: "[T]here was no method of obtaining a so-called official interpretation and no written interpretations were being provided by the Washington, D.C. office of CLC to assist the petroleum industry in its efforts to comply with crude oil price regulations." Rec. at 1417. The government was quite cognizant of this reality and for that very reason sponsored the seminar at which the advice here in issue was given.

ance to petitioner at a forum expressly sponsored by the agency for that purpose.[4] No disclaimer whatever was made by the government, and the subsequent assertion that only written interpretations could be relied on cannot diminish the reasonableness of the earlier reliance.

The government now says, "The joke is on you. You shouldn't have trusted us." This position is hardly "worthy of our great government. . . ." *Brandt* v. *Hickel,* 427 F.2d 53, 57 (9th Cir. 1970), *cited with approval in Heckler* v. *Community Health Services,* ____U.S.____, 104 S. Ct. 2218, 2224 n.13 (1984). The government demand that petitioner now pay a penalty of over $5 million for having relied upon earlier authorized representations is hardly a "joke."

Finally, we note that the petitioner requested that, if the Court does not immediately determine to grant the instant petition, the Court defer resolution until such time as it may consider an identical issue presented in the petition to be filed in *United States* v. *Exxon Corp.,* Nos. DC91-100 (Consolidated) (Temp. Emer. Ct. App. July 1, 1985). The government maintains that deferral is inappropriate because petitioner *somehow* will be able to protect its interests on remand. The government is incorrect. Petitioner will be required in the very near future to put in excess of $5 million into an escrow account, and to forego such monies until such time as the agency has acted on the lower court remand. Should the remand in this case be determined before the Court reviews the

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[4] Nor are the facts of this case similar in any way to *Heckler* v. *Community Health Services,* ____ U.S. ____, 104 S. Ct. 2218, 2227 (1984), where the Court emphasized that "respondent prepared those reports on the basis of an oral policy judgment by an official [an insurance intermediary] who, it should have known, was not in the business of making policy. That is not the kind of reasonable reliance that would even give rise to an estoppel against a private party. It therefore cannot estop the Government." Moreover, this was hardly a case where "a private party seeks to spend the Government's money. Protection of the public fisc requires that those who seek public funds act with scrupulous regard for the requirements of law; respondent could expect no less than to be held to the most demanding standards in its quest for public funds." *Id.* at 2225.

petition for *certiorari* filed by Exxon, petitioner's monies will be irretrievably lost by payment to as yet unspecified third parties. Under these circumstances the petitioner can hardly "protect its interests." The underlying controversy here has extended for a decade. The government can offer no legitimate reason why the Court should not defer the resolution of this petition, should the Court so wish, for an additional and very limited period of time.

Respectfully submitted,

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Certificate of Service

I hereby certify that on this 27th day of September, 1985, three copies of the Reply Brief of Petitioner were mailed, first class postage prepaid, to:

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I further certify that all parties required to be served have been served in accordance with subsections .3. and .4.(a) of Supreme Court Rule 28.

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